Evidence

CHAPTER 2

Part I—General Matters (MRE Articles I, II, III, V, and XI)

Part II—Relevancy (MRE Article IV)

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Part I—General Matters (MRE Articles I, II, III, V, and XI)

2.1 Evidence—Overview

The admissibility of evidence is governed by the common law, statutes and the Michigan Rules of Evidence (MRE). See MRE 101. The MRE cover the vast majority of evidentiary issues and are the beginning point for any analysis. Generally, the MRE provide that evidence is admissible if relevant (MRE 402), unless excluded by one of the other rules. The exclusionary rules typically state the exclusion and then provide for the exceptions to the exclusions. For example, the hearsay rule provides for the exclusion of hearsay (MRE 802) and then provides the exceptions to the exclusion (MRE 803, 804). The goal of the rules is to ascertain truth and have proceedings justly determined. MRE 102.

The following outline may assist with the analysis of evidentiary issues:

- Do the rules of evidence apply? MRE 101; MRE 1101.
- Has the foundation been established? MRE 104.
- Is the evidence relevant as defined by MRE 401? MRE 402.
- Although relevant, is the evidence excludable under the balancing test of MRE 403?
- Although relevant, is the evidence inadmissible under one of the other rules (for example, hearsay or privilege)?
- Is there an exception to the rule which precludes admission (for example, the business record exception to the hearsay rule)?
- Is the evidence admissible for a limited purpose? MRE 105.

A. Applicability of MRE

The MRE apply, except for the situations and proceedings listed in MRE 1101(b)(1)-(10). MRE 1101(a).

Also, statutory rules of evidence may apply if they do not conflict with the MRE. MRE 101; *People v McDonald*, 201 Mich App 270, 273 (1993); *McDougall v Eliuk*, 218 Mich App 501, 506-507 (1996).

B. Basis for Objection

Require the attorneys to give the reason or the authority for the objection.

C. Response to Objection

When there is an objection, it may be helpful to ask the other attorney what the evidence is being offered to prove.

D. Preliminary Findings of Fact or Rulings on Evidence

Distinguish between preliminary findings of fact (to which MRE do not apply) and rulings on evidence (which are covered by the rules).

Remember MRE (except those rules relating to privileges) do *not* apply to preliminary findings of fact. MRE 104(a) and 1101(b)(1). Preponderance of evidence standard applies. *People v Vega*, 413 Mich 773, 782 (1982).

E. State Reason for Ruling

Give the reason for your ruling even for a routine objection and decision. MRE 103.

F. Discretion

Mention discretion when the court has discretion. Decision under MRE 403 is an example. Remember the court does not have discretion under many rules of evidence.

G. Allow Offer of Proof When Excluding Evidence

Permit offer of proof if excluding evidence. MRE 103(a)(2). For example, allow the witness to testify or the attorney to summarize what the witness would say.

H. Continuing Objection

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. MRE 103(a)(2).

I. Standard of Review

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. However, if the decision involves a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of the evidence, questions of law are reviewed de novo. Therefore, when such preliminary questions are at issue, an abuse of discretion will be found when a trial court admits evidence that is inadmissible as a matter of law. *People v Katt*, 468 Mich 272, 278 (2003); *Waknin v Chamberlain*, 467 Mich 329, 332 (2002).

2.2 Motion in Limine

MRE 103 – Rulings on Evidence

MRE 104 – Preliminary Questions of Admissibility and Relevancy

A. Purpose

A motion in limine, filed in advance of trial, asks the court to instruct the parties, attorneys or witnesses not to mention certain facts, unless and until permission of the court is first obtained outside the presence of the jury. *Lapasinskas v Quick*, 17 Mich App 733, 737 fn1 (1969).

Neither the court rules or the MRE specifically provide for a motion in limine, but the courts have the inherent discretion to decide preliminary evidentiary questions in either a civil or criminal case. In a criminal case, the motion is often a motion to suppress. See MRE 104. *Lapasinskas v Quick*, 17 Mich App 733, 737 fn1 (1969). Also note *People v O'Quinn*, 185 Mich App 40, 42-43 (1990) and *People v Williamson*, 205 Mich App 592, 596 (1994).

A common use of a motion in limine is to address potential inflammatory evidence prior to trial. See *Burke v Angis, Inc*, 143 Mich App 683, 688 (1985).

B. Possible Uses

1) Irrelevant or prejudicial evidence. MRE 401 and MRE 403.

2) Character evidence* to prove conduct. MRE 404.

*See Section 2.13 for a discussion of character evidence.

Note: In *People v Williamson*, 205 Mich App 592, 596 (1994), the Court held that trial courts do not need to have an evidentiary hearing on the issue of 404(b) evidence if no motion in limine was filed. The Court stated:

> "Furthermore, the trial court's failure to conduct an evidentiary hearing regarding the admissibility of the evidence does not require reversal. Neither *People v Golochowicz,* 413 Mich 298; 319 NW2d 518 (1982), nor *People v Engelman*, 434 Mich 204; 453 NW2d 656 (1990), mandates that an evidentiary hearing be held where, as in this case, no motion in limine has been made by the defense." *Id*.

3) Prior convictions.* MRE 609.

*Section 2.28 discusses prior convictions.

4) Subsequent remedial efforts.* MRE 407.

*Section 2.17 discusses subsequent remedial efforts.

5) Offers to settle.* MRE 408.

*Section 2.18 discusses settlement negotiations.

6) Existence of insurance.* MRE 411.

*Section 2.19 discusses the existence of insurance.

7) Privilege.* MRE 501.

*Section 2.10 discusses privileges.

8) Estoppel issues from prior litigation.

9) Witness qualifications.

C. Standard of Review

A court's decision whether to admit evidence is reviewed for an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 196 (2003); *Kochoian v Allstate Ins Co*, 168 Mich App 1, 12 (1988).

2.3 Admissibility

MRE 104 – Preliminary Questions

A. Preliminary Question Concerning Admissibility—MRE 104(a)

> "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) [relevancy requirement]. In making its determination it is not bound by the Rules of Evidence except those with respect to privileges." MRE 104(a).

B. Practice Guide to MRE 104

	Preliminary Questions Of Admissibility: 104(a)	**Conditional Relevance: 104(b)**
Question to be resolved.	Does evidence proffered meet the technical or constitutional requirements of admissibility?	Is the proffered evidence relevant where its probative force is conditioned on proof of another fact(s)?
Are the rules of evidence applicable in resolving the question?	No, except those with respect to privileges.	Yes.
What is the standard of persuasion for resolving the question to be resolved?	Preponderance of the evidence. *People v Vega*, 413 Mich 773, 782 (1982).	Preponderance of the evidence. *People v Vega*, 413 Mich 773, 782 (1982).
Who ultimately decides the question to be resolved?	The judge.	The jury.
What is the role of the judge in resolving the question?	To determine whether the foundational requirements of admissibility have been demonstrated by the proponent of the evidence by a preponderance of the evidence.	To determine whether a reasonable fact finder could find the fact(s) upon which the proffered evidence's relevance depends by a preponderance of the evidence.

	Preliminary Questions Of Admissibility: 104(a)	Conditional Relevance: 104(b)
What is an example?	To admit prior recorded testimony the proponent must show unavailability by a preponderance. The rules of evidence are not applicable at the hearing.	To demonstrate the relevance of Rule 404(b) evidence the proponent must show that a reasonable jury could find by a preponderance of evidence that the defendant committed it. The rules of evidence are applicable at the hearing.

C. Who Decides

1. Exhibits

MRE 1008 states:

> "When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact."

2. Other Evidence

However, when the evidence is not the "contents of writings, recordings, or photographs," which preliminary questions are for the judge and which questions are for the jury. The Court in *People v Vega,* 413 Mich 773, 678-679 (1982), describes an excellent principal for determining who decides these preliminary questions in all other situations. Referencing MRE 104, the Court in *Vega* quotes *United States v Eubanks*, 591 F2d 513, 519 (CA 9, 1979):

> "We must look beyond the language of the rule to its underlying policies to determine who should decide the preliminary questions and what standard of proof should control the decision on admissibility. A rule that puts the admissibility of co-conspirator statements in the hands of the jury does not avoid the danger that the jury might convict on the basis of these statements without first dealing with the admissibility question. It was the same danger which motivated the Supreme Court to hold in *Jackson v Denno*, 378 US 368 (1964), that a criminal defendant is entitled to have a reliable and clear-cut determination of the voluntariness of his confession, including the resolution of disputed facts upon which

the voluntariness issue may depend, made by someone other than the jury which is to determine his guilt or innocence. *Id.* at 391.

"We are therefore convinced that preliminary questions of conditional relevance envisioned by Rule 104b are those which present no such danger or prejudice to the defendant. They are questions of probative force rather than evidentiary policy. They involve questions as to the fulfillment of factual conditions which the jury must answer.

"The admissibility of a co-conspirator's declarations in a conspiracy trial, however, does pose problems precisely because they are relevant. Such evidence endangers the integrity of the trial because the relevancy and apparent probative value of the statements may be so highly prejudicial as to color other evidence even in the mind of a conscientious juror, despite instructions to disregard the statements or to consider them conditionally. As a result, such statements should be evaluated by the trained legal mind of the trial judge.' *United States v James*, 590 F2d 575, 579 (CA 5, 1979)."

2.4 Foundation

MRE 602 – Lack of Personal Knowledge

MRE 901 – Requirement of Authentication or Identification

A. Lack of Personal Knowledge—MRE 602

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses." MRE 602.

B. Requirement of Authentication or Identification—MRE 901

Authentication or identification is a condition precedent to admissibility of evidence at trial. See *People v Berkey*, 437 Mich 40, 45, 47 (1991). The proponent must provide evidence sufficient to support a finding that the matter in question is what proponent claims it is.

MRE 901(b) contains the following examples of authentication or identification:

- Testimony of a witness with knowledge;
- Nonexpert opinion* on handwriting;
- Comparison by trier or expert witness;*
- Distinctive characteristics and the like;
- Voice identification;*
- Telephone conversations;
- Public records or reports;
- Ancient documents or data compilations;
- Process or system; and
- Methods provided by statute or rule.

*See Section 2.32 for a discussion of lay opinions.

*See Section 4.13 for a discussion of expert opinions.

*See Section 4.12(H) for a discussion of voice identification.

In addition to the above, there are special rules for many types of evidence.

C. Self-Authentication—MRE 902

Some evidence, such as public records, is self-authenticating. MRE 902 and MCL 600.2107.

2.5 Judicial Notice

MRE 201 – Judicial Notice of Adjudicative Facts.

MRE 202 – Judicial Notice of Law.

CJI 2d 4.6 – Judicial Notice

M Civ JI 3.13 – Fact Judicially Noticed

A. Purpose

Judicial notice is a substitute for proof. *Winekoff v Pospisil*, 384 Mich 260, 268 (1970). A court may not take judicial notice of the existence of a necessary element of an offense. *People v Taylor*, 176 Mich App 374, 376 (1989).

B. Statute

Judicial notice of a Michigan statute is mandatory. *American Casualty Co v Costello*, 174 Mich App 1, 8 (1989).

C. Public Records

MCL 600.2107 states:

> "Copies of all papers, records, entries and documents, required or permitted by law to be filed by any public officer in his[or her] office, or to be entered or recorded therein and duly filed, entered or recorded according to law, certified by such officer to be a true transcript compared by him[or her] with the original in his[or her] office, shall be evidence in all courts and proceedings, in like manner as the original would be if produced."

MRE 1105 states:

> "The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given."

The Court of Appeals has found that judicial notice is appropriate when applied to a court judgment or opinion pursuant to MCL 600.2160. *In re Sumpter Estate*, 166 Mich App 48, 57 (1988).

2.6 Burden of Proof

CJI 2d 1.9 – Presumption of Innocence, Burden of Proof, and Reasonable Doubt

M Civ JI 8.01 – Meaning of Burden of Proof

A. Generally

"Burden of Proof" has two separate meanings. One of these meanings is the burden of persuasion. The other is the burden of going forward. *Kar v Hogan*, 399 Mich 529, 539 (1976).

B. Burden of Persuasion

The party with the burden of persuasion has the duty of establishing the truth of his or her case according to the weight of evidence required. *McKinstry v Valley OB-GYN*, 428 Mich 167, 178-179 (1987).

The burden of persuasion never shifts. In a civil case the plaintiff has the burden of persuasion. In a criminal case, the prosecutor has it. *McKinstry*, *supra*.

C. Burden of Production (Burden of Going Forward)

The party with the burden of production has the duty to introduce sufficient evidence to have the relevant issue considered by the court. *McKinstry, supra* at 179.

The burden of production may shift from one party to another. For example, legal presumptions may help a party meet its burden of production and shift the burden of production to another party.

2.7 Presumptions

MRE 301 – Presumptions in Civil Actions and Proceedings

MRE 302 – Presumptions in Criminal Cases

CJI 2d 3.2 – Presumption of Innocence, Burden of Proof and Reasonable Doubt

A. Civil Case—MRE 301

MRE 301 addresses presumptions in civil cases.

The Michigan Court of Appeals addressed presumptions in *Isabella Co DSS v Thompson*, 210 Mich App 612, 615-616 (1995):

> "The trial court must determine whether, as a matter of law, a presumption exists. . . .
>
> "MRE 301, entitled 'Presumptions in Civil Actions and Proceedings,' explains the effect of rebuttable presumptions:
>
> > "In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of

> proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

"In short, a presumption is a procedural device that regulates the burden of proceeding with the evidence. The presumption is dissipated, however, once substantial evidence has been submitted by its opponent.

"In *Widamayer* [*v Leonard*, 422 Mich 280, 289 (1985)] our Supreme Court clarified some confusion in the law regarding presumptions and the effect of MRE 301:

> "If the jury finds a basic fact, they must also find the presumed fact unless persuaded by the evidence that its nonexistence is more probable than its existence.
>
> "We so hold because we are persuaded that the function of a presumption is solely to place the burden of producing evidence on the opposing party. It is a procedural device which allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting the presumption. [422 Mich 289, Emphasis added.]

"Thus, an unrebutted presumption can form the basis for a directed verdict or summary disposition in favor of the moving party." [Citations omitted.]

B. Criminal Case—MRE 302

MRE 302 provides:

> "(a) Scope. In criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.
>
> "(b) Instructing the jury. Whenever the existence of a presumed fact against an accused is submitted to the jury, the court shall instruct the jury that it may, but need not, infer the existence of the presumed fact from the basic facts and that the prosecution still bears the burden of proof beyond a reasonable doubt of all the elements of the offense."

In a criminal case, a presumption creates an inference which does not bind the fact finder. It also places on the defendant the burden of producing evidence on the presumed fact while the ultimate burden of proof* remains with the prosecutor.

*See Section 2.6 for a discussion of the burden of proof.

CJI 2d 3.2(1) must be given in every criminal case and states:

> "A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that [he/she] is guilty."

C. Legislative Presumption

"Legislative presumptions are valid so long as there is a rational connection between the proven facts and the fact to be presumed. *People v Gallagher*, 404 Mich 429; 273 NW2d 440 (1979), *People v John E Moore*, 78 Mich App 565; 261 NW2d 3 (1977). If the presumed fact is more likely than not to flow from the proven fact, the presumption is constitutionally valid. *People v Gallagher, supra.*" *People v Dorris*, 95 Mich App 760, 765 (1980).

2.8 Order of Proof

MCR 2.509(C) – Suspension of Enforcement and Dismissal

MCR 6.414(A) – Conduct of Jury Trial

MRE 611(a) – Mode and Order of Interrogation and Presentation

A. Generally

The trial court has the discretion to determine the order of proof and the sequence in which issues are tried. MCR 2.509(C), MCR 6.414(A) and MRE 611(a).

B. Conditional Admission of Evidence

MRE 104(b) permits the admission of evidence conditioned upon subsequent proof of relevancy.*

*See Section 2.3 regarding admissibility.

C. Rebuttal Evidence

A trial judge has discretion whether to admit rebuttal evidence, and admission of rebuttal evidence will not be disturbed absent a clear abuse of discretion. The trial judge's discretion stems from his authority to exclude evidence that

is substantially more prejudicial than probative under MRE 403. *People v Figgures*, 451 Mich 390, 398-399 (1996). Also see *People v Humphreys*, 221 Mich App 443, 446 (1997).

"Rebuttal evidence is admissible to 'contradict, repel, explain, or disprove evidence produced by the other party and tending directly to weaken or impeach the same.' The question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination." *Figgures, supra*.

The test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but rather whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. *Id.*

In a criminal case, rebuttal should not be used to introduce evidence that should have been included in the people's case in chief. *People v Losey*, 413 Mich 346, 351-352 (1982); *People v King*, 210 Mich App 425, 433 (1995); *People v McGillen #1*, 392 Mich 251, 265-266 (1974); and *People v Calabro*, 166 Mich App 389, 393 (1988). The prosecution may not use rebuttal witnesses to merely restate its case, since rebuttal testimony must be limited to rebuttal. *People v Coleman*, 51 Mich App 539, 542 (1974). The prosecutor may not use the device of eliciting a denial on cross-examination to inject a new issue into the case, or to introduce evidence that should have been included in the prosecutor's case in chief. *Losey, supra* at 352.

D. Reopening Proofs

Generally, the reopening of proofs for either the prosecution or defense rests within the sound discretion of the trial judge. *People v Keeth*, 193 Mich App 555, 560 (1992); and *People v Collier*, 168 Mich App 687, 694 (1988). Relevant in ruling on a motion to reopen proofs is whether any undue advantage would be taken by the moving party and whether there is any showing of surprise or prejudice to the nonmoving party. *Id.* at 694-695.

E. Standard of Review

A trial court's determination of the order of proofs is reviewed for an abuse of discretion. *Grover v Kalamazoo*, 98 Mich App 465, 470 (1980).

A trial court's decision regarding the admission of rebuttal testimony is reviewed for an abuse of discretion. *People v Humphreys*, 221 Mich App 443, 446 (1997).

2.9 Limits on Evidence and Testimony

MCL 768.29 – Judge's Duty at Trial; Effect of Failure to Instruct

MCR 2.401(C)(1) – Pretrial Conference; Scope

MCR 2.401(I) – Witness Lists

MCR 6.414(A) – Court's Responsibility

MRE 611(a) – Control by Court

MRE 611(a) provides the court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence . . .", to ascertain the truth, avoid wasted time and protect witnesses. This rule implies that a judge has inherent authority to exercise some discretion regarding the mode of proofs.

A. Precluding a Witness From Testifying

MCR 2.401(C)(1) and (I) authorize a trial court to prohibit testimony from witnesses not identified in a pretrial order or required witness list. Note especially MCR 2.401(I)(2). See also *Impullitti v Impullitti*, 163 Mich App 507, 510 (1987).

The decision whether to allow an undisclosed witness to testify is a matter within the trial court's discretion. The trial court has discretion in allowing or disallowing the testimony of witnesses not on the witness list. *Dunn v Lederle Laboratories*, 121 Mich App 73, 89 (1982) and *Pastrick v Gen Tel Co*, 162 Mich App 243, 245 (1987). Trial courts should not be reluctant to allow unlisted witnesses to testify where justice so requires, particularly with regard to rebuttal witnesses. *Id.* The court may impose reasonable conditions on allowing the testimony of an undisclosed witness if there is no prejudice to the opposing party. *Id.* at 246.

The trial court has discretion to allow parties to testify once the witness list is stricken. *Grubor Enterprises v Kortidis*, 201 Mich App 625, 629 (1993). In exercising its discretion, "the trial court should determine whether the party can prove the elements of its position based solely on the party's testimony and any other documentary evidence. If not, the action should be dismissed." *Id.*

B. Limiting the Length of Questioning

MRE 403 and MRE 611(a) apparently authorize the court to restrict the length of time a witness may be questioned. It is recognized that courts have the discretion to limit voir dire, MCR 2.511(C) and MCR 6.412(C), opening statement and closing argument, MCR 2.507(F) and MCR 6.414(B) and (E), and it is apparently in their power to exercise reasonable discretion over the length of interrogation. At least one case has recognized that the trial court has authority to limit the time for examination of a witness, at least after it has gone on for sometime, *Hartland Twp v Kucykowicz*, 189 Mich App 591, 595

(1991). In *Kucykowicz*, on the fifth day of trial, the court limited examination of witnesses to one hour for direct examination and one hour for cross-examination. The Michigan Supreme Court concluded, "the record shows that the trial court properly exercised its discretion in limiting the time for examination of witnesses." *Id.* at 596.

Although a trial court is entitled to control the proceedings in the courtroom, the court cannot do so at the expense of a defendant's constitutional rights. *People v Arquette*, 202 Mich App 227, 232 (1993). Restrictions on a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. *Rock v Arkansas*, 483 US 44, 55-56 (1987).

C. Limiting the Number of Trial Days to Prevent Cumulative Evidence

The trial court in *MCI Communications v American Tel & Tel Co*, 708 F2d 1081, 1171 (CA 7, 1983), reviewed witness lists and summaries of the witnesses' testimony, prior to trial, and imposed a twenty-six day time limit on each side's case-in chief. The United States Court of Appeals, Seventh Circuit, held:

- Litigants are not entitled to burden the court with an unending stream of cumulative evidence. *Id.*

- FRE 403 provides that evidence, although relevant, may be excluded when its probative value is outweighed by such factors as its cumulative nature, or the "undue delay" and "waste of time" it may cause. Whether the evidence will be excluded is a matter within the district court's sound discretion and will not be reversed absent a clear showing of abuse. *Id.*

  Note: FRE 403 contains language similar to MRE 403. MRE 403 states:

  > "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

- The limits set were subject to change if the court found them to be unduly restrictive. The court indicated that it intended to allow each party sufficient time to present its case. *Id.* at 1172.

D. Limiting Cumulative Evidence—MRE 403

The Court in *McDonald v Stroh Brewery Co*, 191 Mich App 601, 608 (1991) held:

> "[T]he trial court properly excluded the continuing testimony of defendant's former vice president regarding the economic necessity of the terminations. Before the point of exclusion, the witness' testimony was entirely consistent with that of several prior witnesses. Plaintiffs have not shown that the excluded testimony would have been other than cumulative."

E. Require Plaintiff to Submit Written Narrative of Direct Testimony of Each Witness

In *Chapman v Pacific Tel & Tel Co*, 613 F2d 193 (CA 9, 1979), the trial court required plaintiff to submit a written narrative statement of the direct testimony of all witnesses plaintiffs intended to call at trial. The United States Court of Appeals, Ninth Circuit, held that:

> "The procedure employed by the court in this case was not 'trial by affidavit' as appellant insists. . . . Indeed, it was commendable. Direct oral testimony was to be permitted to supplement the written narrative statement 'where there may be questions of credibility or other particular problems.' Oral cross-examination and oral redirect were also contemplated." *Id.* at 197.

2.10 Privileges

MRE 104(a) – Preliminary Questions of Admissibility

MRE 501 – Privilege; General Rule

A. Source and Scope

Privileges are governed by the common law, except as modified by statute or court rule. MRE 501.

> "Unlike other evidentiary rules that exclude evidence because it is potentially unreliable, privilege statutes shield potentially reliable evidence in an attempt to foster relationships. While the assurance of confidentiality may encourage relationships of trust, privileges inhibit rather than facilitate the search for truth. Privileges therefore are not easily found or endorsed by the courts. 'The existence and scope of a statutory privilege ultimately turns on the language and meaning of the statute itself.' Even so, the goal of statutory construction is to ascertain and facilitate the intent of the

> Legislature." *People v Stanaway*, 446 Mich 643, 659 (1994). [Citations omitted.]

B. Suggested Analysis

- What privilege is claimed?
- Was there a relationship covered by the privilege?
- Was there a communication covered by the privilege?
- Who holds the privilege?
- Has the privilege been waived (expressly or by statute or court rule)?

C. Assertion of Privilege

*See Section 2.31 for a discussion of self-incrimination.

Determining Validity of Claim.* In *People v Paasche*, 207 Mich App 698, 709-710 (1994), the Supreme Court stated:

> "The [*People v Poma*, 96 Mich App 726 (1980)] opinion established a procedure to protect the defendant's rights when the trial court is confronted with a potential witness who plans to assert a testimonial privilege. First, a trial court must determine whether the witness understands the privilege and must provide an adequate explanation if the witness does not. The court must then hold an evidentiary hearing outside the jury's presence to determine the validity of the witness' claim of privilege. If the court determines the assertion of the privilege to be valid, the inquiry ends and the witness is excused.
>
> "If the assertion of the privilege is not legitimate in the opinion of the trial judge, the court must then consider methods to induce the witness to testify, such as contempt and other proceedings. If the witness continues to assert the privilege, the court must proceed to trial without the witness, because there is no other way to prevent prejudice to the defendant." [Citations omitted.]

*See Section 3.28 for a discussion of an in camrea review when a priviledge is asserted.

Discovery. Privileged material may not be obtained through discovery.* MCR 2.302(B)(1). If a party knows before his or her deposition that he or she will assert a privilege he or she must move to prevent the taking of the deposition or be subject to sanctions under MCR 2.306(G). MCR 2.306(D)(3) and (4). A party must assert a privilege at his or her deposition or lose it. MCR 2.306(D)(4). If the privilege is asserted the party may not at trial offer his or her testimony on the evidence objected to during the deposition. MCR 2.306(D)(4). Also see MCL 330.1750(2) and MCL 600.2157 which require disclosure in certain proceedings.

Medical information.* MCR 2.314(B). If a party asserts a valid privilege to prevent discovery of medical information relating to their mental or physical condition, they may not later present evidence about that condition. *Gibson v Bronson Methodist*, 445 Mich 331, 333 (1994).

*See Section 3.28(B) for a discussion of discovery of medical records.

D. Waiver

A privilege, and the right to waive that privilege, belong to the individual making the communication. *People v Rosa*, 268 Mich 462 (1934); *People v Wood*, 447 Mich 80, 89-90 (1994).

E. Recognized Privileges

Attorney-Client privilege is a common law privilege. The privilege is that of the client, who can waive it. The privilege may be asserted by either the attorney, on behalf of the client, or the client. See *Sterling v Keiden*, 162 Mich App 88 (1987).

Attorney's work product has a qualified privilege under MCR 2.302(B)(3)(a). See *Messenger v Ingham Prosecutor*, 232 Mich 633, 637-640 (1998) for a discussion of the work product privilege. The work product privilege covers statements made by witnesses to counsel shortly after the accident. However, the production of such documents may be required for the impeachment of a witness. *Lynd v Chocolay Twp*, 153 Mich App 188, 193-195 (1986), citing, *Freel v Railway Co*, 97 Cal 40 (1892), and *People v Dellabonda*, 265 Mich 486 (1933).

Clergy privilege is addressed by MCL 600.2156.

CPA-client privilege is governed by MCL 339.732.

Hospital records-peer review privilege is governed by MCL 331.533 and 333.21515. *Dorris v Detroit Osteopathic Hospital*, 460 Mich 26, 32-43 (1999).

Informant's privilege is governed by case law. *People v Underwood*, 447 Mich 695, 703-707 (1994).

Mediation statements and communications during mediation are confidential. MCR 2.411(C)(5) and MCR 3.216(H)(8).

Minister-confessor privilege is governed by MCL 600.2156 and MCL 600.2912f.

Physician-patient privilege is governed by MCL 600.2157. Waiver of physician-patient privilege is governed by MCL 600.2912f.

Polygraph examiners' privilege is governed by MCL 338.1728.

Probation records and reports are privileged under MCL 791.229.

Psychologist-patient privilege is governed by MCL 333.18237.

Reporter's privilege is governed by MCL 767.5(a)(1).

Privilege against self incrimination.* U.S. and Michigan Constitutions.

*See Section 2.31 for information on the privilege against self incrimination.

Social worker-client privilege is governed by MCL 339.1610.

Spousal communications privilege is governed by MCL 600.2162. See *People v Warren*, 462 Mich 415 (2000).

Teacher (guidance officer)-student privilege is governed by MCL 600.2165.

Trade secrets can be protected under MCR 2.302(C)(8).

There are many other statutes that provide for confidentiality of particular information.

2.11 Missing Evidence

M Civ JI 6.01 – Failure to Produce Evidence or a Witness

A. Civil Case

"Generally, where a party deliberately destroys evidence, or fails to produce it, courts presume that the evidence would operate against the party who destroyed it or failed to produce it." *Hamann v Ridge Tool Co*, 213 Mich App 252, 255 (1995). See also *Johnson v Secretary of State*, 406 Mich 420, 440 (1979). This rule has been applied even when the loss of the evidence was unintentional. *Hamann, supra* at 258. It has also been applied when a party failed to preserve evidence before filing suit. *Brenner v Kolk*, 226 Mich App 149, 156-161 (1997); *MASB-SEG v Metalux*, 231 Mich App 393, 400 (1998).

A party may be sanctioned for spoliation of evidence even though the evidence was not technically lost or destroyed. *Bloemendaal v Town & Country Sports Center, Inc,* 255 Mich App 207, 212 (2002). The rule has even been applied when the party had evidence but failed to admit it into evidence. *Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 521 (1999). In *Lagalo, supra* at 520, the court emphasized that an adverse presumption arises from intentional conduct, while an adverse inference is permissible under SJI2d 6.01(d) (now M Civ JI 6.01d) for a failure to produce evidence with no reasonable excuse. Also see *Brenner v Kolk, supra*.

In determining whether an adverse inference should be permitted, the court should consider whether (1) the evidence was under the control of the party and could have been produced by him or her, *Isagholian v Transamerica Ins*

Co, 208 Mich App 9, 15 (1994); (2) whether there is no reasonable excuse for the failure to produce the evidence, *Leeds v Masha*, 328 Mich 137, 140 (1950); (3) whether the evidence would have been material and not merely cumulative, *Barringer v Arnold*, 358 Mich 594, 605 (1960); and (4) whether the evidence was equally available to the other party, *Cavanaugh v Cardamone*, 147 Mich App 159, 163 (1985).

Dismissal is a possible sanction, but a drastic step that should be taken cautiously and only after evaluating all other available options on the record. See *Bloemendaal v Town & Country Sports Center, Inc,* 255 Mich App 207, 214 (2002).

B. Criminal Case

The suppression of material exculpatory evidence violates a defendant's due process rights. However, if the evidence is only potentially exculpatory the defendant must show: (1) that the government acted in bad faith in failing to preserve the evidence; (2) that its exculpatory value was apparent before its destruction; and (3) that the defendant would be unable to obtain comparable evidence by other reasonable available means.* *Arizona v Youngblood*, 488 US 51, 56-58 (1988). The defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith. *People v Johnson*, 197 Mich App 362, 365 (1992).

*See Section 4.27 for a discussion of discovery in a criminal case.

Jury instruction on missing evidence in criminal case. In *People v Hardaway,* 67 Mich App 82, 85-87 (1967), the trial judge instructed the jury that they may infer that routinely erased police broadcast tapes could have been adverse to the prosecution. The court held that the defendant was not prejudiced by the failure to produce the tapes. See also *Johnson, supra* at 365.

The destruction of a defendant's blood sample is not a violation of MCL 780.655, the Search Warrant statute, where the defendant had a reasonable period of time within which to request further testing of the blood sample before destruction, the destruction schedule is reasonable, routine, well-established, administered in good faith, and communicated to the defendant in a manner sufficient to enable his timely and convenient objection. *People v Jagotka*, 461 Mich 274, 281 (1999), reversing in part *People v Jagotka*, 232 Mich App 346 (1998), in which the Court of Appeals found that when MCL 780.655(5) is violated the evidence is admissible if the jury is instructed that it may infer that the destroyed evidence may have favored defendant.

Part II—Relevancy (MRE Article IV)

2.12 Relevant Evidence

MRE 401 – Definition of "Relevant Evidence"

MRE 402 – Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

MRE 403 – Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

A. Relevant Evidence Defined—MRE 401

> "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

Relevant evidence is generally admissible. MRE 402. In *People v Mills*, 450 Mich 61, 67-68 (1995), the Supreme Court explained that there are two separate questions that must be answered to determine whether evidence is relevant:

> "First, we must determine the 'materiality' of the evidence. In other words, we must determine whether the evidence was of consequence to the determination of the action. Second, we must determine the 'probative force' of the evidence, or rather, whether the evidence makes a fact of consequence more or less probable than it would be without the evidence.
>
> "Materiality, under Rule 401, is the requirement that the proffered evidence be related to 'any fact *that is of consequence*' to the action. . . . A fact that is 'of consequence' to the action is a material fact. 'Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial.'
>
> * * *
>
> "In addition to determining the materiality of the evidence, we must also consider the principle of probative force. Probative force is the 'tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' Further, 'any' tendency is sufficient probative force. MRE 401." [Citations and footnotes omitted.]

B. Relevant Evidence Admissible—MRE 402

In *People v Hampton*, 407 Mich 354, 367 (1979), the Michigan Supreme Court addressed the issue of relevancy as follows:

> "Under MRE 402, all relevant evidence is admissible unless otherwise excluded. Relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence, MRE 401. The test of relevancy is designed to determine whether a single piece of evidence is of such significant import that it warrants being considered in a case. The standards for admissibility are designed to permit the introduction of all relevant evidence, not otherwise excluded, on the theory that it is best to have as much useful information as possible in making these types of decisions."

The Supreme Court in *People v Hardiman,* 466 Mich 417, 428 (2002), overruled *People v Atley*, 392 Mich 298 (1974), which had established the doctrine forbidding the building of an inference upon an inference because that doctrine failed to comport with MRE 401, which defines relevant evidence as that having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

C. Exclusion of Relevant Evidence (Balancing Test)—MRE 403

MRE 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The Michigan Court of Appeals addressed the issue of "unfair prejudice" in *Sclafani v Cusimano Inc*, 130 Mich App 728, 735-736 (1983), finding:

> '"Unfair prejudice' does not mean 'damaging.' *Bradbury v Ford Motor Co*, 123 Mich App 179, 185 (1983). Any relevant testimony will be damaging to some extent. We believe that the notion of 'unfair prejudice' encompasses two concepts. First, the idea of prejudice denotes a situation in which there exists a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury. In other words, where a probability exists that evidence which is minimally damaging in logic will be weighed by the juror substantially out of proportion to its logically damaging effect, a situation arises in which the danger of 'prejudice' exists. Second, the idea of unfairness embodies the further proposition that it would be inequitable to allow the proponent of the evidence to use it. Where a substantial danger of prejudice exists from the admission of particular evidence, unfairness will usually, but not invariably, exist. Unfairness might not exist where, for instance, the critical evidence supporting a party's position on a key issue raises the danger of prejudice within the meaning of MRE 403 as we have defined this term but the proponent of this evidence has

> no less prejudicial means by which the substance of this evidence can be admitted."

D. Standard of Review

The trial court has discretion in determining relevancy. The standard of review is abuse of discretion and ordinarily decisions on close evidentiary issues will not be reversed. In *People v Bahoda*, 448 Mich 261, 289 (1995) (citing *People v Golochowicz*, 413 Mich 298, 322 (1982)), the Court stated:

> "When reviewing evidentiary decisions under MRE 401 and 403, our review is limited to whether the decision was an abuse of discretion. In doing so, we are mindful that close questions arising from the trial judge's exercise of discretion on matters concerning the admission of evidence do not call for appellate reversal because the reviewing justices would have ruled differently. Reversal is warranted only if the resolution of the question by the trial court amounted to an abuse of discretion. The decision upon a close evidentiary question by definition ordinarily cannot be an abuse of discretion."

2.13 Character Evidence

MRE 404 – Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

MRE 405 – Methods of Proving Character

MRE 608 – Evidence of Character and Conduct of Witness

MRE 803(21) – Hearsay Exception, Reputation as to Character

A. Character Evidence Not Admissible to Prove Conduct

Character evidence is generally not admissible for the purpose of showing action in conformity with the character. MRE 404. There are exceptions that permit proof of character or conduct when relevant.

Evidence of the reputation of a person's character among associates or in a community is not excluded by the hearsay rule. MRE 803(21).

B. Exceptions

- MRE 404(a) — Pertinent Character Trait
- MRE 404(b) — Similar Acts (Prior Bad Acts)

- MRE 405(a) — Reputation
- MRE 405(b) — Specific Instances of Conduct
- MRE 406 — Habit
- MRE 608 — Credibility
- MRE 609 — Prior Convictions

See also:

- Section 2.15, Habit; and
- Section 2.28, Impeachment of Witness.

C. Presenting Character Evidence—MRE 405

1. Reputation and Opinion—MRE 405(a)

> "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. . . ."

MRE 405(a) was amended in 1991. 437 Mich cci, ccii (1990). The amendment conformed MRE 405 to its federal counterpart (FRE 405) by adding "or by testimony in the form of an opinion" to the first sentence.

2. Reputation in the Community

Reputation evidence is admissible from whatever community the party or witness earned the reputation. See *People v Lyons*, 51 Mich 215 (1883) and *People v Mix*, 149 Mich 260 (1907). "Community" may include a business or jail community. Regarding business communities, see *Hubert v Joslin*, 285 Mich 337 (1938); *People v Kronk*, 326 Mich 744 (1950); *People v Morrin*, 31 Mich App 301 (1971). Regarding jail communities, see *People v Bieri*, 153 Mich App 696 (1986).

3. Basis for Witness' Knowledge of Reputation

A character witness must have a basis of knowledge of the character of the individual he or she is testifying about. *People v Shultz*, 116 Mich 106 (1946); *People v DeLano*, 318 Mich 557 (1947); *People v Morrin*, 31 Mich App 301 (1971). If the witness testifies to hearing numerous reports about the person's reputation but cannot name the people who made the statements, it is error to exclude the evidence. *Neal v Neal*, 181 Mich 114 (1914).

Evidence that there has been no discussion in the community about the person's reputation is admissible to show the person's good reputation if the

witness testifies that he generally hears whatever discussion there is in the community. *People v Woods*, 206 Mich 11 (1919).

4. Specific Instances of Conduct—MRE 405(b)

MRE 405(b) states:

> "In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct."

In *People v Nichols*, 125 Mich App 216, 220-221 (1983), the Court of Appeals stated "where a claim of self-defense in a homicide case raises an issue of who was the aggressor, in order to show the deceased's quarrelsome and turbulent nature, evidence of specific instances of violence by the deceased may be admitted if directly connected with and involved in the homicide or if known by the defendant. However, specific instances of violence and lawlessness are generally inadmissible. The latter are too remote to show that the deceased was the aggressor in the particular case." Also see *People v Pere*, 66 Mich App 685, 693 (1976).

The Court in *People v Whitfield*, 425 Mich 116, 130-131 (1986), provided the following explanation for the interaction between MRE 404 and MRE 405:

> "MRE 404(a)(1) . . . allows a criminal defendant an absolute right to introduce evidence of his character to prove that he could not have committed the crime. MRE 404(a)(1) allows the introduction of '[evidence] of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.' The latter part of MRE 404(a)(1) is the source of the doubt about the wisdom of presenting character evidence as part of an accused's defense: Once a defendant introduces character testimony, the prosecution can then rebut that testimony. Under MRE 405(a), the accused can only present favorable character evidence in the form of reputation testimony. However, MRE 405(a) permits the prosecution's rebuttal to be done either by cross-examining defense character witnesses concerning reports of specific instances of conduct, or by presenting witnesses who testify to the bad reputation of the defendant. *People v Champion*, 411 Mich 468; 307 NW2d 681 (1981)."

D. Evidence of Character of Defendant—MRE 404(a)(1)

1. Offered by Defendant

Evidence of a pertinent character trait of defendant may be offered by the defendant to prove that he acted in conformity with that trait on a particular occasion. MRE 404(a)(1).

In *People v Whitfield*, 425 Mich 116, 130-131 (1986), the Court stated:

> "One of the exceptions to the general rule barring the use of character to prove conformance therewith on a particular occasion is the so-called 'mercy rule' found in MRE 404(a)(1), which allows a criminal defendant an absolute right to introduce evidence of his character to prove that he could not have committed the crime. MRE 404(a)(1) allows the introduction of '[evidence] of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.' The latter part of MRE 404(a)(1) is the source of the doubt about the wisdom of presenting character evidence as part of an accused's defense: Once a defendant introduces character testimony, the prosecution can then rebut that testimony. Under MRE 405(a), the accused can only present favorable character evidence in the form of reputation testimony. However, MRE 405(a) permits the prosecution's rebuttal to be done either by cross-examining defense character witnesses concerning reports of specific instances of conduct, or by presenting witnesses who testify to the bad reputation of the defendant. *People v Champion*, 411 Mich 468; 307 NW2d 681 (1981)." [Footnotes omitted.]

2. Offered by Prosecution

The prosecution may present evidence of a pertinent character trait of defendant only to rebut character evidence presented by the defense, or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under MRE 404(a)(2), evidence of a trait of character for aggression of the accused may be offered by the prosecution. MRE 404(a)(1). *People v Johnson*, 409 Mich 552, 558 (1980); *People v Whitfield*, 425 Mich 116, 131 (1986).

The prosecution cannot put a defendant's character at issue, nor comment on the accused's failure to call character witnesses. *People v Dunn*, 233 Mich 185 (1925); *People v Johnson*, 409 Mich 552 (1980); *People v Boske*, 221 Mich 129 (1922).

However, if the defendant testifies, evidence of a conviction may be allowed for impeachment purposes pursuant to MRE 609.*

*See Section 2.28 for more information on impeachment of a witness.

And, pursuant to MRE 404(b)(1), evidence of other crimes wrongs, or acts is not admissible to prove the character of a person to show that he acted in conformity, but it may be admissible for other purposes including: motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident.*

*See Section 2.14 for information on similar acts evidence.

E. Evidence of Character of Victim — MRE 404(a)(2) and (3)

1. Offered by Defendant

Homicide Victim. Evidence of a trait of character for aggression of the victim may be offered by the defendant to prove that the victim acted in conformity with that trait on a particular occasion. MRE 404(a)(2).

If the defendant is claiming self defense, character evidence of a deceased victim can be offered to prove that the victim acted in conformity with his reputation on a particular occasion (i.e. was the aggressor), if Defendant was aware of the reputation. *People v Pere*, 66 Mich App 685 (1976); *People v Anderson*, 147 Mich App 781 (1985). The defendant may offer such evidence, regardless of his knowledge of the reputation, if there is an issue about who is the aggressor or the circumstances are unclear. *People v Dunn*, 233 Mich 185 (1925); *People v Stallworth*, 364 Mich 528 (1961); *People v Burks*, 387 Mich 393 (1972); *People v Harris*, 458 Mich 310 (1998).

CJI 2d 7.23 addresses past violence by the alleged victim. It contains options covering specific acts and general reputation.

CSC Victim (Rape Shield Act).* MCL 750.520j states:

*See Smith, *Sexual Assault Benchbook*, (MJI, 2002), Section 7.2 for more information on the rape shield provisions. See also Section 4.28.

> "(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> > "(a) Evidence of the victim's past sexual conduct with the actor.
> >
> > "(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
>
> "(2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1)."

See MRE 404(a)(3), it also addresses past sexual conduct with the defendant and evidence of specific instances of sexual activity showing source or origin of semen, pregnancy, or disease.

2. Offered by Prosecution

Character evidence of the victim may be offered by the prosecution only to rebut character evidence of the victim offered by the defense. MRE 404(a)(2). For example, rebuttal testimony by the people regarding reputation of a complaining witness for truth and veracity is permitted only when an attack has been made upon the reputation of the witness. *People v Tolewitzke*, 332 Mich 455 (1952).

If the defendant is claiming self defense in a homicide case, the prosecution may offer evidence of the character trait of peacefulness of the victim to rebut any evidence (not just character evidence) that the victim was the first aggressor. MRE 404(a)(3).

F. Evidence of Character of Witness—MRE 608(a) and (b)

1. Reputation or Opinion—MRE 608(a)

It is not proper to ask a witness, including the defendant, to comment or provide an opinion on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17 (1985); *People v Badour*, 167 Mich App 186, 197 (1988). Also see *People v Beckley*, 434 Mich 691, 728 (1990). *Buckey, supra* at 18, suggests an appropriate cautionary instruction if there is an objection.

Reputation or opinion evidence offered to support or attack credibility of a witness may only refer to the truthfulness or untruthfulness of the witness (i.e. evidence that the witness is a "bad" person is not allowed under this rule).

Reputation or opinion evidence that a witness, other than the defendant in a criminal case, is truthful is permitted *only* when an attack has been made upon the reputation of the witness. *People v Tolewitzke*, 332 Mich 455 (1952). The attack may be by reputation or opinion evidence or "otherwise" as when cross-examination seeks to establish that the witness's testimony is fabricated. See *People v Sylvester Smith*, 90 Mich App 20 (1979); *People v Sommerville*, 100 Mich App 470 (1980); and *People v Matthews*, 143 Mich App 45 (1985).

The Court may be called upon to make a determination whether there has been an attack on the witness' character for truthfulness. This determination appears to rest with the Court's discretion. See *People v Sylvester Smith*, 90 Mich App 20, 25 (1979); *People v Matthews*, 143 Mich App 45, 60 (1985); *People v Winchell*, 171 Mich App 662, 665-666 (1988); and *People v Lukity*, 460 Mich 484, 490-491 (1999). Each of these cases gives examples of a Court's determination whether there was an attack on credibility.

2. Specific Instances of Conduct — MRE 608(b)

Except for evidence of a conviction which is allowed pursuant to MRE 609, evidence of specific instances of conduct of a witness is NOT allowed to support or attack the witness's credibility. *People v Mitchell*, 402 Mich 506 (1978).

But on cross-examination, the trial judge has discretion to allow inquiry into specific instances of conduct, if they are probative of the truthfulness or untruthfulness of the testifying witness or another witness whom the testifying witness has given character evidence testimony about. See *People v Brownridge*, 459 Mich 456, 463 (1999).

G. Impeachment of Character Witness on Cross-Examination

1. Reports of Relevant Misconduct—MRE 405(a)

On cross-examination, inquiry can be made into reports of relevant specific instances of conduct or misconduct. MRE 405(a). (For example the witness may be asked, "Have you heard. . ."). See *People v McClow*, 40 Mich App 185 (1972); *People v Dorrikas*, 354 Mich 303 (1958); and *People v Stedman*, 41 Mich App 393 (1972). Cross-examination is limited to conduct bearing on the character trait testified to by the witness on direct examination. *People v McClow*, 40 Mich App 185 (1972). Also see *People v Whitfield,* 425 Mich 116, 129-134 (1986) (re motion in limine).

2. Specific Instances of Conduct (Bad Acts)

On cross-examination, it is permissible to inquire into reports of specific instances of conduct, including convictions, arrests, bad acts, or rumors of bad conduct. See *People v Champion*, 411 Mich 468 (1981); *People v Smith*, 97 Mich App 778 (1980); *People v Rosa,* 268 Mich 462 (1934); *People v Stedman*, 41 Mich App 393 (1972); and *People v McClow*, 40 Mich App 185 (1972).

However, first the attorney must, out of the presence of the jury, substantiate that the conduct occurred. See *People v Dorrikas*, 354 Mich 303 (1958); *People v Robinson*, 70 Mich App 606 (1976); *People v Castanada*, 81 Mich App 453 (1978); *People v Smith*, 97 Mich App 778 (1980); and *People v Adams*, 122 Mich App 759 (1983).

2.14 Similar Acts Evidence

MCL 768.27 – Evidence; Proof of Intent or Motive by Similar Acts

MRE 404(b) – Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes, Wrongs, or Acts

CJI 2d 4.11 – Evidence of Other Offenses—Relevance Limited to Particular Issue

A. Rule

MRE 404(b)(1) states:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case."

"MRE 404(b) applies to the admissibility of other acts of *any* person, such as a defendant, a plaintiff, or a witness." *People v Rockwell*, 188 Mich App 405, 409-410 (1991). The rule applies to both civil and criminal cases.

B. *VanderVliet* Test

MRE 404(b) codifies the requirements set forth in *People v VanderVliet*, 444 Mich 52 (1993). The admissibility of other acts evidence under MRE 404(b), except for modus operandi evidence used to prove identity, is generally governed by the test established in *VanderVliet,* which is as follows:

- The evidence must be offered for a purpose other than to show the propensity to commit a crime. *Id.* at 74.
- The evidence must be relevant under MRE 402 to an issue or fact of consequence at trial. *VanderVliet, supra* at 74.
- The trial court should determine under MRE 403 whether the danger of undue prejudice substantially outweighs the probative value of the evidence, in view of the availability of other means of proof and other appropriate facts. *VanderVliet, supra* at 74-75.
- Upon request, the trial court may provide a limiting instruction under MRE 105, cautioning the jury to use the evidence for its proper purpose and not to infer a bad or criminal character that caused the defendant to commit the charged offense. *VanderVliet, supra* at 75.

The *VanderVliet* case underscores the following principles of MRE 404(b):

- There is no presumption that other acts evidence should be excluded. *VanderVliet, supra* at 65.
- The Rule's list of "other purposes" for which evidence may be admitted is not exclusive. Evidence may be presented to show any fact relevant under MRE 402, except criminal propensity. *VanderVliet, supra.*
- A defendant's general denial of the charges does not automatically prevent the prosecutor from introducing other acts evidence at trial. *Id.* at 78-79.
- MRE 404(b) imposes no heightened standard for determining logical relevance or for weighing the prejudicial effect versus the probative value of the evidence. *VanderVliet, supra* at 68, 71.

The Supreme Court in *VanderVliet* characterized MRE 404(b) as a rule of inclusion rather than exclusion:

> "There is no policy of general exclusion relating to other acts evidence. There is no rule limiting admissibility to the specific exceptions set forth in Rule 404(b). Nor is there a rule requiring exclusion of other misconduct when the defendant interposes a general denial. Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith. . . . Rule 404(b) permits the judge to admit other acts evidence *whenever* it is relevant on a noncharacter theory." [Emphasis in original.] *VanderVliet, supra* at 65.

As stated above, other acts evidence will not violate MRE 404(b), unless it is offered solely to show a defendant's criminal propensity. Thus, if other acts evidence is admissible for a proper purpose under MRE 404(b), it should not be deemed inadmissible simply because it also demonstrates criminal propensity. In cases where the evidence is admissible for one purpose but not others, the trial court must, upon request, give a limiting instruction pursuant to MRE 105. See *People v Sabin (After Remand),* 463 Mich 43, 56 (2000); *VanderVliet, supra* at 73-75; *People v Basinger*, 203 Mich App 603, 606 (1994) (absence of opportunity to request a limiting instruction was grounds for reversal because it denied defendant a fair trial); and *People v DerMartzex,* 390 Mich 410, 417 (1973) (failure to give properly requested instruction is reversible error). The trial court has no duty to give a limiting instruction sua sponte, however. *People v Chism,* 390 Mich 104, 120-121 (1973).

The continued viability of *VanderVliet's* analytical framework, and its characterization of MRE 404(b) as a rule of inclusion rather than exclusion, was affirmed in *Sabin (After Remand), supra* at 55-59, and in *People v Katt,* 248 Mich App 282, 304 (2001).

C. *Golochowicz* Test

The admissibility of other acts evidence under MRE 404(b) is not always governed by *VanderVliet's* test. When the proponent is seeking admission of other acts evidence based on a *modus operandi theory to establish identity,* the trial court should employ the test enunciated in *People v Golochowicz,* 413 Mich 298, 309 (1982).* See *VanderVliet, supra* at 66, and *People v Ortiz,* 249 Mich App 297, 303 (2001). The *Golochowicz* test is as follows:

- There must be substantial evidence that the defendant actually perpetrated the bad act sought to be introduced.
- There must be some special quality or circumstance of the bad act tending to prove the defendant's identity or the scheme, plan, or system in doing the act.
- One or more of these factors must be material to the determination of the defendant's guilt of the charged offense.
- The probative value of the evidence sought to be introduced must not be substantially outweighed by the danger of unfair prejudice. *Id.* at 309.

*Generally speaking, the *VanderVliet* test supplanted the *Golochowicz* test. However, the *Golochowicz* test remains valid when the proponent of other acts evidence seeks to show identification through modus operandi. *People v Smith,* 243 Mich App 657, 670-671 (2000).

D. Examples of Application of MRE 404(b)

Establishing motive is a proper purpose for which prior-acts evidence is admissible. Motive is the moving power that impels the action for a definite result or that which incites or stimulates a person to do an act; it is the cause or reason that moves the will and induces action or that which leads or tempts the mind to indulge a criminal act. *People v Hoffman*, 225 Mich App 103 (1997). See also *People v Sabin (After Remand),* 463 Mich 43 (2000).

Where prosecutor sought to introduce evidence that other infants in defendant's care had suspicious injuries to establish defendant's intent and absence of mistake, it was error for the trial court to prohibit the evidence as impermissible character evidence under MRE 404(b). *People v Martzke (On Remand),* 251 Mich App 282, 292 (2002).

Evidence of the "*prior good acts*" of the victim's mother may not be introduced by the prosecution to preempt a defense theory that the mother, not the defendant-father, killed the child. *People v Knox*, 256 Mich App 175 (2003); (reversed and remanded on other grounds, *People v Knox,* 469 Mich 502, 514 (2004)).

E. Notice Requirement

MRE 404(b)(2) provides in relevant part:

> "The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. . . ."

*See Section 2.2 for more information on motions in limine.

This rule does not require a hearing on the admissibility of the proposed evidence. Either party could address admissibility by using a motion in limine. In *People v Williams*, 205 Mich App 592, 596 (1994), the Court found that trial courts do not need to have an evidentiary hearing on the issue of MRE 404(b) evidence if no motion in limine was filed. In *Williams*, the court stated:

> "Furthermore, the trial court's failure to conduct an evidentiary hearing regarding the admissibility of the evidence does not require reversal. Neither *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982), nor *People v Engelman*, 434 Mich 204; 453 NW2d 656 (1990), mandates that an evidentiary hearing be held where, as in this case, no motion in limine has been made by the defense."

F. Cautionary Instruction

The cautionary instruction contemplated by *VanderVliet, supra*, is CJI 2d. 4.11 (Evidence of Other Offenses—Relevance Limited to Particular Issue).

G. Standard of Review

A trial court's decision on admission of similar acts testimony is reviewed under the abuse of discretion standard. *People v Sabin (After Remand)*, 463 Mich 43 (2000); *People v Crawford*, 458 Mich 376, 383 (1998). MRE 403 determinations are best left to the contemporaneous assessment of the presentation, credibility, and effect of the testimony by the trial judge. *People v VanderVliet, supra* at 81.

2.15 Habit or Routine Practice

MRE 406 – Habit; Routine Practice

A. Statute

MRE 406 states:

> "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of

the person or organization on a particular occasion was in conformity with the habit or routine practice."

B. Requirements

The Michigan Courts have repeatedly addressed the admissibility of evidence of habit or routine practice and held that such evidence is permissible to demonstrate comparable conduct on the occasion in question. *Laszko v Cooper Laboratories, Inc*, 114 Mich App 253, 255 (1982); *McNabb v Green Real Estate Company*, 62 Mich App 500 (1975). Evidence of habit or routine practice must demonstrate a pattern or establish that the action was standard practice or that the action was executed innumerable times. *Laszko, supra*, p 256. The testifying witness must have known about the routine procedure prior to testifying and understand the steps involved in the practice. *Laszko, supra*; *Cook v Rontal*, 109 Mich App 220, 224-225 (1981).

The Michigan courts have agreed that habit or routine practice evidence is extremely compelling as proof of like conduct on a particular occasion. *McKinstry v Valley OB-GYN*, 428 Mich 167, 182, fn 6 (1987).

2.16 Prior Accidents

Evidence of prior accidents has always been admissible to show defendant's notice or knowledge of the defective or dangerous condition alleged to have caused the accident.* *Freed v Simon*, 370 Mich 473, 475 (1963).

*See Section 2.42(D) for information on absense of prior accident.

Evidence of prior accidents at the same place and arising from the same cause is admissible not only to show defendant's notice or knowledge of the defective or dangerous condition alleged to have caused the accident, but to show the defendant's negligence on the theory defendant, having notice or knowledge of the defect, is held to a higher degree of care by reason of his notice of such dangerous condition than he otherwise would be. *Id.*

Subject to the general requirements of similarity of conditions, reasonable proximity in time, and avoidance of confusion of issues, the courts have generally recognized that evidence of the occurrence of a prior similar accident at the same place as the accident in suit has some tendency to establish a dangerous or defective condition at the place in question and may be admitted for this purpose, in actions where the dangerous condition of the place in question is at issue. *Id.* at 475-476.

2.17 Subsequent Remedial Measures

*See Section 2.42(E) for information on prior conditions.

> "When, after an event, measures are taken which, if taken previously would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." MRE 407.*

In *Denolf v Frank L Jursik Co*, 395 Mich 661, 667 (1976), the court stated that MRE 407 "is primarily grounded in the policy that owners would be discouraged from attempting repairs that might prevent future injury if they feared that evidence of such acts could be introduced against them." However, evidence of subsequent repairs may be admissible if the following criteria are met:

> "(1) evidence of subsequent remedial action is otherwise relevant, (2) admission of the evidence would not offend policy considerations favoring encouragement of repairs, and (3) the remedial action is not undertaken at the direction of a party plaintiff so that it does not constitute a self-serving, out-of-court declaration by that party." *Denolf, supra* at 669-670.

A similar rule excluding subsequnet changes in products liability cases is found at MCL 600.2946(3).

2.18 Settlement Negotiations

MRE 408 – Compromise and Offers to Compromise

MRE 409 – Payment of Medical and Similar Expenses

MRE 410 – Inadmissibility of Pleas, Plea Discussions, and Related Statements

A. Generally

Offers to settle and settlement discussions in civil or criminal cases are not admissible. MRE 408; MRE 410.

Offering to pay medical or similar expenses is not admissible to prove liability. MRE 409.

Under MRE 410, any statement made during the course of plea discussions with an attorney for the prosecuting authority which do not result in a guilty

plea or in a plea that is later withdrawn are inadmissible against the person who made the plea or participated in the discussions. However, in *People v Stevens*, 461 Mich 655, 668-669 (2000), the Court held that a defendant may waive the protections provided by MRE 410, "as long as they are appropriately advised and as long as the statements admitted into evidence are voluntarily, knowingly, and understandingly made."

The Court in *United States v Robinson*, 582 F2d 1356, 1366 (CA 5, 1978), provided the following guidance in determining when a discussion should be characterized as a plea negotiation:

> "To determine whether a discussion should be characterized as a plea negotiation and as inadmissible, the trial court should carefully consider the totality of the circumstances. Thus, each case must turn on its own facts. . . . In essence, the rule of inadmissibility is designed to serve both as an incentive and as a prophylactic; the rule both encourages and protects a free plea dialogue between the accused and the government. Given this essential purpose, the trial court's initial inquiry must be focused on the accused's perceptions of the discussion, in context.
>
> "Obviously then, the accused's assertions concerning his state of mind are critical in determining whether a discussion should be characterized a plea negotiation. However, under a totality of the circumstances approach, an accused's subsequent account of his prior subjective mental impressions cannot be considered the sole determinative factor. Otherwise, every confession would be vulnerable to such subsequent challenge. The trial court must apply a two-tiered analysis and determine, first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances." [Citations omitted.] [Footnote omitted.]

The Michigan Supreme Court adopted this approach in *People v Dunn*, 446 Mich 409, 415(1994).

2.19 Insurance Coverage

MCL 500.3030 – Insurer Not to be Made or Joined as Party Defendant; Reference to Insurer or Insurance During Trial.

MRE 411 – Liability Insurance

A. Generally

MCL 500.3030 precludes reference, during the course of a trial, to the insurer or the question of carrying insurance except as otherwise provided by law.

MRE 411 provides that whether a person is insured is not admissible evidence on the issue of whether he acted negligently or otherwise wrongfully. The rule does not require exclusion of such evidence when offered for another purpose such as proof of agency, ownership or control, if controverted, or bias or prejudice of a witness.

"References to the insurance coverage of either party during voir dire is presumptively improper. However, this presumption may be rebutted and any error regarded as harmless." *Phillips v Mazda Motor Mfg*, 204 Mich App 401, 411 (1994). [Citations omitted.] Offending counsel must overcome, "by a persuasive showing, a presumption that his remarks were judicially improper." *Kokinakes v British Leyland*, 124 Mich App 650, 652-653 (1983).

> "By statute, reference to available insurance coverage is not to be made by any party. MCLA 500.3030. It has been repeatedly held that it is reversible error to intentionally interject the subject of insurance if the sole purpose is to inflame the passions of the jury so as to increase the size of the verdict. On the other hand, it is not reversible error if the subject is only incidentally brought into the trial, is only casually mentioned, or is used in good faith for purposes other than to inflame the passions of the jury." *Cacavas v Bennett*, 37 Mich App 599, 604 (1972). [Citations omitted.]

2.20 Police Report

A. Police Report Not Admissible

A police report is not admissible. *Solomon v Shuell*, 435 Mich 104 (1990). In the context of the case, the court concluded the report was not admissible as a business record, MCL 600.2146, MRE 803(6) or as a public record, MRE 803(8). See also *People v Hoffman*, 205 Mich App 1, 16 (1994).

B. Accident Report Not Admissible

A motor vehicle accident report prepared by the police under MCL 257.622 is not available for use in a court action. MCL 257.624.

2.21 Polygraph

A. Polygraph Results Generally Inadmissible

Evidence of the taking of a polygraph examination or the results are not admissible at trial. *People v Barbara*, 400 Mich 352, 359 (1977). Also see *People v Rocha*, 110 Mich App 1 (1981); *Stone v Earp*, 331 Mich 606, 610

(1951); *Thangavelu v Dep't of Licensing & Regulation*, 149 Mich App 546, 551 (1986).

A defendant may not introduce a favorable polygraph result, but the United States Supreme Court has left open the possibility that a judge has discretion to admit such evidence. *United States v Scheffer*, 523 US 303 (1998).

A defendant's statutory right to a polygraph examination under MCL 776.21(5), does not include the right to have the examination tape-recorded. *People v Manser*, 250 Mich App 21, 32 (2002). Furthermore, information that a defendant did not receive a tape-recorded polygraph is not relevant at trial. *Id.* The defendant's statutory right to a polygraph examination applies at any time during the pretrial and trial process until a verdict is rendered. *People v Phillips*, 469 Mich 390 (2003).

The mere mention of a polygraph test, without more, does not require a mistrial. *People v King*, 215 Mich App 301, 308 (1996); *People v Johnson*, 396 Mich 424, 435-497 (1976); *People v Baker*, 7 Mich App 471, 476 (1967); and *People v Maguire*, 38 Mich App 578, 580-582 (1972). In *People v Rocha*, 110 Mich App 1, 8-9 (1981), the Court of Appeals set forth the factors to be considered in determining whether or not mention of a polygraph was ground for a mistrial:

> "This court should consider 1) whether the defendant objected and/or sought a cautionary instruction, 2) whether the reference was inadvertent, 3) whether there were repeated references, 4) whether the reference was an attempt to bolster a witness's credibility, and 5) whether the results of the tests were admitted, rather than merely the fact that a test had been conducted." [Citations omitted.]

1. Mention of Polygraph Required Reversal

When, during a bench trial, the prosecutor mentioned a polygraph examination of the defendant, a copy of which was filed with the court, and the judge questioned the officer regarding the number of polygraph tests he had performed in the past, the conviction was reversed as the prosecutor's injection of the polygraph testing and results was unfairly prejudicial to defendant's case, even though the court found it had not been influenced by this information. *People v Smith*, 211 Mich App 233, 234-235 (1995).

In *People v Brocato*, 17 Mich App 291 (1969), a prosecutor's repeated references to polygraph tests, after a warning by the court, was held improper and contemptuous.

In *People v Nash*, 244 Mich App 93, 101 (2000), the court found that a key prosecution witness's reference to taking a polygraph test seriously affected the fairness of the trial.

2. Mention of Polygraph Did Not Require Reversal

In *People v Triplett*, 163 Mich App 339 (1987), remanded on other grounds, 432 Mich 568 (1989), a witness' reference to a "specialized interview" was not considered improper or inadmissible because there was no specific reference to the fact that the defendant had failed a polygraph examination.

In *People v Tyrer*, 19 Mich App 48, 50 (1969), a police officer's comment that defendant said he would take a polygraph examination if his attorney advised to do so, was held not to be prejudicial when defendant was aware of the possible error and chose to waive his objection and proceed with the trial.

B. Cautionary Instruction

If evidence of a polygraph test is admitted or improper argument made about it, the court should instruct the jury as to the unreliability of such tests. *People v Baker,* 7 Mich App 471, 476 (1967).

C. Exceptions

1. Motion to Suppress Evidence

*See Section 4.10 for more information on motions to supress.

The court has discretion to admit polygraph results in support of a motion to suppress* illegally seized evidence. *People v McKinney*, 137 Mich App 110, 114-117 (1984).

2. Motion for New Trial

*See Section 4.53 for more information on motions for a new trial.

Polygraph results may be admissible in support of a motion for new trial.* *Barbara, supra* at 412; *People v Mechura*, 205 Mich App 481, 484 (1994). In exercising its discretion, the court must consider the factors set forth in *Barbara, supra* at 412-413. The five factors are: (1) When they are offered on behalf of the defendant, (2) the test was taken voluntarily, (3) the professional qualifications of the polygraph examiner and the quality of the polygraph equipment and procedures employed meet the approval of the court, (4) either the prosecutor or the court is able to obtain an independent examination of the subjector of the test results by an operator of the court's choice, and (5) the results are considered only with regard to the general credibility of the subject. *Id.* at 412-413. *Barbara, supra* at 413, sets forth additional requirements that a separate record be made which shall not be used at any any subsequent trial and the "judge granting a new trial on the basis of polygrpah tests shall not thereafter act as a trier of fact in that case but may preside with a jury. A substitute judge as trier of fact shall not be privy to the polygraph examination or results, or to the fact that a polygraph examination was taken or was in any way involved."

D. Right to Counsel

The Michigan Court of Appeals found that a defendant has the right to have counsel present during a polygraph examination. *People v Leonard*, 125 Mich App 756 (1983). In *Wyrick v Fields*, 459 US 42 (1982), the Court found a defendant may waive the right to have counsel present at a polygraph examination. See also *People v McElhaney*, 215 Mich App 269 (1996). This finding presupposes that a defendant has the right to have an attorney present at a polygraph examination. See *People v Pottruff*, 116 Mich App 367 (1982).

E. Defendant's Right to Polygraph

A defendant charged with criminal sexual conduct may request a polygraph examination under MCL 776.21(5). The request may be made at anytime before a verdict is rendered. *People v Phillips,* 469 Mich 390, 396 (2003).

F. Agreement to Dismiss Based on Results of Polygraph

A defendant may be able to enforce an agreement to dismiss a case based upon the result of a polygraph examination. *People v Reagan*, 395 Mich 306 (1975).

G. Polygraph Examiners Privilege

There is a statutory privilege that applies to polygraph examiners. MCL 338.1728. Information obtained by polygraph examiner during an examination conducted at the request of an attorney is subject to the attorney-client privilege. *In re petition of Delaware*, 191 Mich App 399, 407 (1979).

Part III—Witnesses, Opinions, and Expert Testimony (MRE Articles VI and VII)

2.22 Witness Disclosure*

*See Sections 3.30 and 4.30 for more information on witness disclosures.

MCR 2.401 – Pretrial Procedures; Conferences; Scheduling Orders

MCR 6.201 – Discovery

MCL 767.40a – Attaching List of Witnesses to Filed Information; Disclosing Names of Res Gestae Witnesses; Sending List to Defendant or Defendant's Attorney; Additions or Deletions From List; Request for Assistance in Locating and Serving Process on Witness; Objection to Request; Hearing; Impeachment or Cross-Examination of Witness.

MCL 767.94a(1)(a) – Disclosure of Certain Material or Information by Defendant to Prosecuting Attorney.

A. Civil Case

1. Witness List

The court can require parties to file a witness list. MCR 2.401(B)(2)(a)(*i*).

2. Sanction for Failure to File Witness List

While it is within the trial court's authority to bar an expert witness or dismiss an action as a sanction for the failure to timely file a witness list, the fact that such action is discretionary rather than mandatory necessitates a consideration of the circumstances of each case to determine if such a drastic sanction is appropriate. The corollary to this is that the mere fact that a witness list was not timely filed does not, in and of itself, justify the imposition of such a sanction. Rather, the record should reflect that the trial court gave careful consideration to the factors involved and considered all of its options in determining what sanction was just and proper in the context of the case before it.

> "Among the factors that should be considered in determining the appropriate sanction are: (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive." *Dean v Tucker*, 182 Mich App 27, 32-33 (1990). [Footnotes omitted).]

The trial court's decision is reviewed for an abuse of discretion. *Id.*; and *Thorne v Bell*, 206 Mich App 625, 633 (1994).

3. Discretion to Permit or Exclude Testimony of Undisclosed Witness

MCR 2.401(C)(1) and (I)(2) authorize a trial court to prohibit testimony from witnesses not identified in a pretrial order or required witness list. See also *Gillam v Lloyd*, 172 Mich App 563 (1988); *Hayes-Albion Corp v Kuberski,* 421 Mich 170 (1984).

The decision whether to allow an undisclosed witness to testify is a matter within the trial court's discretion. The trial court has great discretion in allowing the testimony of witnesses not on the witness list. *Dunn v Lederle Laboratories*, 121 Mich App 73, 89 (1982) and *Pastrick v Gen Tel Co*, 162 Mich App 243, 245 (1987). Trial courts should not be reluctant to allow

unlisted witnesses to testify where justice so requires, particularly with regard to rebuttal witnesses. *Id.* The court may impose reasonable conditions on allowing the testimony of an undisclosed witness if there is no prejudice to the opposing party. *Id.* at 246. The trial court has discretion to allow parties to testify once the witness list is stricken. *Grubor Enterprises v Kortidis*, 201 Mich App 625, 629 (1993). In exercising its discretion, "the trial court should determine whether the party can prove the elements of its position based solely on the party's testimony and any other documentary evidence. If not, the action should be dismissed." *Id*.

B. Criminal Case

The prosecutor has a statutory duty to disclose witnesses, MCL 767.40a. This statute also covers additions to the witness list. See MCL 767.40a(4). MCL 767.94a(1)(a) provides that a defendant may also be required to identify witnesses. Under MCR 6.201, the criminal discovery rule, which supersedes MCL 769.94a, either the prosecutor or the defendant may be required to disclose witnesses.*

*For further discussion see Section 4.30.

2.23 Exclusion of Witnesses

MCL 600.1420 – Courtrooms Open to the Public; Exceptions

MRE 615 – Exclusion of Witnesses

A. Exclusion of Witnesses—MRE 615

On its own motion or at the request of a party, the court may order witnesses excluded under MRE 615. A party or a party's representative or an essential person may not be excluded. Based on the language of the rule, the court has discretion whether to grant or deny such a motion, although it is routinely granted.

B. Victim

The victim has the right to be present for trial. If the victim will be a witness the court may, for good cause, sequester the victim until he or she testifies. MCL 780.761; MCL 780.789 (juvenile proceedings).

C. Limit Discussion

As a separate issue, the court has discretion whether to order the sequestered witnesses not to discuss the case outside the courtroom. *People v Linzey*, 112 Mich App 374, 379 (1981); *People v Stanley*, 71 Mich App 56, 62 (1976).

D. Violation

The court has discretion to deal with a violation of its exclusionary order. *People v Dickerson*, 62 Mich App 457 (1975); *People v Boose*, 109 Mich App 455 (1981); *People v Cyr*, 113 Mich App 213 (1982). See also *People v Gonyea*, 126 Mich App 177 (1983).

The court should consider the following options in fashioning a response to a violation of an exclusionary order:

- Cite the witness for contempt;
- Permit the witness' noncompliance to reflect on credibility;
- Preclude the witness' testimony;
- Strike the witness' testimony;
- Declare a mistrial.

E. Standard of Review

"[T]rial courts have discretion to order sequestration of witnesses and descretion in instances of violation of such an order to exclude or to allow the testimony of the offending witness." *People v Nixten*, 160 Mich App 203, 209 (1987). When a trial court fails to exercise discretion if properly asked to do so, the court abuses that discretion. *Id.*

2.24 Competency of Witness

MRE 601 – General Rule of Witness Competency*

*For information on the competency of a child witness, see Section 2.25.

A. General Rule

> "Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules." MRE 601.

All witnesses are presumed to be competent to testify. The test is whether the witness has the capacity and sense of obligation to testify truthfully and understandably. *People v Watson*, 245 Mich App 572, 583 (2001).

B. Standard of Review

The determination of the competency of a witness is a matter within the discretion of the trial court and will be reversed only for an abuse of discretion. *People v Breck*, 230 Mich App 450, 457 (1998).

2.25 Child Witness

MCL 600.2163a – Special Arrangements to Protect Welfare of Witness

MCR 3.972(C)(2) – Admission of a Child's Statement Regarding Child Abuse, Child Neglect, Sexual Abuse, or Sexual Exploitation

MRE 601 – Competency of Witnesses

MRE 803A – Hearsay Exception, Child's Statement About a Sexual Act

CJI 2d 5.9 – Child Witness

A. Competency

MRE 601 provides that a person is competent to testify as a witness unless the Court finds otherwise or he or she is precluded from testifying by the Rules of Evidence.

Former MCL 600.2163 [repealed, effective 8-3-98, 1998 PA 323], by implication, provided that a child over 10 was presumptively qualified since the statute provided when a child witness is under 10, the Court by public or separate examination shall determine if "such child has sufficient intelligence and sense of obligation to tell the truth to be safely admitted to testify." The statute also required a child under 10 be given an oath to "promise to tell the truth" instead of the statutory oath, apparently at the Court's discretion, See CJI 2d 5.9.

A child witness can be examined for competency in the presence of the jury, *People v Wright*, 149 Mich App 73, 74 (1986), or in chambers, *People v Washington*, 130 Mich App 579, 581-582 (1983). The issue of competency for all witnesses is a preliminary question. MRE 104. The form of the interrogation for all witnesses is addressed by MRE 611.

The "tender years" exception to the hearsay rule did not survive the adoption of the original Michigan Rules of Evidence. *People v Kreiner*, 415 Mich 372, 377 (1982). But it was reinstated with the adoption of MRE 803A. Although the rule was reinstated with the adoption of MRE 803A, it is different than the rule was before the original Michigan Rules of Evidence.

B. Confrontation

MCL 600.2163a, permits special arrangements for the testimony of children or other impaired persons. These special arrangements can include the presentation of children's testimony by videotape. *People v Pesquera,* 244 Mich App 305 (2001)). Right of confrontation concerns have been addressed by the Court in *People v Kasben*, 158 Mich App 252, 254-255 (1987), and *People v James*, 182 Mich App 295, 298-299 (1990). See also *In re Deeren*, 158 Mich App 539, 542 (1987); and *United States v Moses*, 137 F3d 894 (CA 6, 1998). The Court in *Maryland v Craig*, 497 US 836, 845 (1990), held that the use of contemporaneous closed-circuit testimony was constitutional when the court determines that it is necessary to further an important public policy.

MCL 768.3 requires a person tried for a felony to be present during that trial. Where a defendant was accused of criminal sexual conduct involving his five year old child, defendant's exclusion from the courtroom while the child testified was a violation of the statute and required a reversal of his convictions. *People v Krueger*, 466 Mich 50, 56 (2002). In this case the victim initially identified someone else as the violator before saying the defendant, her father, committed the acts. In its ruling the Michigan Supreme Court held that because the question of defendant's guilt was so close, not allowing him in the courtroom to consult with his attorney during cross-examination allowed the jury to form a negative opinion of him. *Id.*

C. Hearing on Improper Interview Techniques (Taint Hearing)

The New Jersey Supreme Court has outlined the process for a pretrial taint hearing when the defendant makes a showing that a child victim's statements were the product of suggestion or coercive interview techniques. *State v Michaels*, 136 NJ 299, 642 A2d 1372 (N J Supreme Court, 1994), discussed at *Michigan Bar Journal,* January 1999, page 32. **Caution**, Michigan has not adopted the process described in *State v Michaels,* 136 NJ 299 (1994).

Michaels is not binding precedent in Michigan. Under *Michaels*, a so-called "taint" hearing is required only after the defendant satisfies the initial burden of showing some evidence that the victim's statements were the product of suggestive or coercive interview techniques. If the showing is made, the burden shifts to the prosecution to prove the reliability of the proffered statements and testimony by clear and convincing evidence. Either party may call expert witnesses. *People v Vanlandingham*, No 241311 (December 2, 2003).

For information on proper interview techniques, see the Forensic Interview Protocol, developed by the State of Michigan Governor's Task Force on Children's Justice and the Family Independence Agency. The Protocol can be found in Miller, *Guardian Ad Litem Protocol*, (MJI, 2004).

D. Custody

MCL 722.23 permits the Court to examine a child separately in custody proceedings, *Burghdoff v Burghdoff*, 66 Mich App 608, 612 (1976). This examination is limited to determining the child's preference and should not cover other best interest of the child factors. *Molloy v Molloy*, 466 Mich 852 (2002); *Impullitti v Impullitti*, 163 Mich App 507, 510 (1987) and *Burghdoff v Burghdoff,* 66 Mich App 608, 612-614 (1976). In camera interviews with children need not be recorded. *Molloy v Molloy*, 466 Mich 852 (2002). Effective May 1, 2004, the Supreme Court amended MCR 3.210(C)(5) to provide that the court may interview a child privately to determine if the child is of sufficient age to express a preference regarding custody, and if he or she is of sufficient age to express his or her reasonable preference. MCR 3.210(C)(5) also requires the court to focus the interview on these determinations and the information received may only be applied to the reasonable preference factor.

The rules of evidence do not apply to in camera proceedings held by the court in child custody matters to determine a child's custodial preference. MRE 1101(b)(6).

2.26 Examination & Cross-Examination

MCL 600.2161 – Cross Examination of Opposite Party or Agent

MRE 611 – Mode and Order of Interrogation and Presentation*

*See also Section 2.9, Limits on Evidence and Testimony.

A. General Rule—MRE 611

MRE 611 (a)–(b) state:

> "(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
>
> "(b) Scope of Cross-Examination. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. The judge may limit cross-examination with respect to matters not testified to on direct examination."

The scope and duration of cross-examination of witnesses rests in the sound discretion of the trial court. See *Wilson v Stilwill,* 411 Mich 587, 599, 601 (1981). MRE 611(c) states:

"(c) Leading Questions.

> "(1) Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony.
>
> "(2) Ordinarily leading questions should be permitted on cross-examination.
>
> "(3) When a party calls a hostile witness, an adverse party or a witness identified with an adverse party, interrogation may be by leading questions. It is not necessary to declare the intent to ask leading questions before the questioning begins or before the questioning moves beyond preliminary inquiries."

MCL 768.24 provides that within the court's discretion, a question is not objectionable solely because it is leading. See *People v Fields,* 49 Mich App 652, 658 (1973).

B. Cross-Examination of Opposite Party

MCL 600.2161 provides a party may call the opposite party, employee or agent and cross examine such witness and not be bound to accept their answers as true. Also note MRE 611(C)(3).

C. Answer on Cross-Examination

It has long been the law of this state that a cross-examining attorney must accept the answer given by a witness regarding a collateral matter. *People v Hillhouse*, 80 Mich 580, 585 (1890). However the law in this realm has nuances, including the rule noted in *People v Vasher,* 449 Mich 494, 504 (1995), that impeachment can be proper on matters "closely bearing on defendant's guilt or innocence." *People v LeBlanc,* 465 Mich 575, 590 (2002).

2.27 Nonresponsive Answer

MRE 103(a)(1) – Rulings on Evidence, Effect of Erroneous Ruling; Objection

Generally, objections must be made as soon as the grounds for objection become apparent. MRE 103(a)(1). In some cases, a question is not objectionable but the answer is unresponsive. The proper method of objecting to such an answer is to bring a motion to strike the objectionable or nonresponsive answer. There are cases from other jurisdictions which state only the party questioning the witness may object to a nonresponsive answer, but no Michigan authority has been found for this proposition.

2.28 Impeachment of Witness—Bias, Character, Prior Convictions, Prior Inconsistent Statements

MCL 600.2158 – Crime; Interest or Relationship of Witness, Effect

MRE 607 – Who May Impeach

MRE 608 – Evidence of Character and Conduct of Witness

MRE 609 – Impeachment by Evidence of Conviction of Crime

MRE 611(b) – Cross-Examination Regarding Credibility

MRE 613 – Prior Statements of Witnesses

MRE 801(d) – Attacking and Supporting Credibility of Declarant

A. Four Classic Ways to Impeach a Witness

- Interest or bias, MRE 611(b).
- Character or reputation for veracity, MRE 608(a) (opinion and reputation), and MRE 608(b) (specific instances);
- Prior conviction of a crime, MRE 609; and
- Prior inconsistent material statement, MRE 613, MRE 801(d)(1)(A), MRE 801(d)(2) and MRE 806.

MRE 707 covers the impeachment of an expert by use of a learned treatise.

B. Impeachment on Collateral Matters

> "It is a well-settled rule that a witness may not be impeached by contradiction on matters which are purely collateral. What is a collateral matter depends upon the issue in the case. The purpose of the doctrine is closely related to the goals of the prejudice rule, MRE 403, and generally the same factors which are employed to determine whether evidence is inadmissible under 403 are used to determine whether extrinsic evidence should be allowed for impeachment purposes." *Cook v Rontal,* 109 Mich App 220, 229 (1981). [Citations omitted.]

Also see *People v Guy*, 121 Mich App 592, 604-605 (1982); *People v Rosen*, 136 Mich App 745, 758 (1984); and *People v Vasher*, 449 Mich 494, 504 (1995).

C. Interest, Bias, & Motive—MRE 401 and 611

The interest or bias of a witness is always relevant. *People v Field*, 290 Mich 173, 178 (1939). Generally, the court has broad discretion to permit questioning to show interest, bias or motive on the part of a witness. *People v Richmond*, 35 Mich App 115, 121 (1971). There is no specific MRE that covers this form of impeachment, but MRE 401and 611 seem applicable.

Where the investigator had previously been acquitted of first-degree criminal sexual conduct against his daughter, the prosecutor was allowed to question the investigator about the acquittal to show his bias as a witness for the defendant. *People v Layher*, 238 Mich App 573 (1999), 464 Mich 756, 764-765 (2001).

D. Character and Reputation—MRE 608

Except for the three exceptions listed in MRE 404(a), and the exceptions under MRE 404(b), evidence of character is generally inadmissible to prove conduct. Where character is relevant it is proved by reputation or opinion evidence and where essential, specific instances of conduct are admissible. MRE 608(a) codifies the common law rule regarding impeachment of a character witness. MRE 608(b) bars extrinsic evidence, except on cross-examination, in the discretion of the court, if probative of a witness's character for truthfulness.

It is not proper to ask a witness to comment or provide an opinion on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17 (1985). Likewise, expert testimony regarding the credibility of a witness is improper. *Franzel v Kerr Manufacturing Co*, 234 Mich App 600, 622 (1999).

*See Section 2.13 regarding character evidence.

Under MRE 608(a), it is appropriate for a witness to offer opinion evidence regarding another witness's character* for truthfulness. Although MRE 608(b) prohibits the admission of extrinsic evidence regarding specific instances of the first witness's conduct, the rule clearly permits the cross-examination of the witness regarding matters such as an alleged false affidavit. Limiting cross-examination on such matters is an abuse of discretion. *People v Brownridge*, 225 Mich App 291, 297 (1997).

E. Prior Conviction of a Crime, Pleas, and Plea Discussions – MRE 410, MRE 803(22), and MRE 609

MRE 410, "**Inadmissibility of Pleas, Plea Discussions, and Related Statements,**" provides that pleas and plea discussions are not admissible, with exceptions.

MRE 803(22), "**Judgment of previous conviction**" states:

> "Evidence of a final judgment, entered after a trial or upon a plea of guilty (or upon a plea of nolo contendere if evidence of the plea is not excluded by MRE 410), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility."

MRE 609, "**Impeachment by Evidence of Conviction of Crime**," states:

> "(A) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and
>
> > "(1) the crime contained an element of dishonesty or false statement, or
> >
> > "(2) the crime contained a element of theft, and
> >
> > > "(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
> > >
> > > "(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect."

See *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 201 (1998).

1. Test for Admissibility

MRE 609 prohibits the admission of evidence of witness' criminal conviction unless the following circumstances exist:

- The evidence is elicited from the witness or established by public record during cross-examination; and
- The crime contained an element of dishonesty or false statement, in which case it is automatically admissible under the "bright line" test of *People v Allen*, 429 Mich 558, 605 (1988), or

- The crime contained an element of theft and is punishable by imprisonment for more than one year; and
- The court makes the further findings specified by MRE 609 (a)(2) and (b) (a determination of the significant probative value on credibility and, if it is a criminal defendant, if probative value outweighs the prejudicial effect).

2. Discretionary Admissibility

To determine discretionary admissibility of a prior conviction involving an element of theft decide:

Probative value, MRE 609(a)(2) and (b);

- Does the prior conviction contain an element of theft?
- Was the crime punishable by imprisonment in excess of one year?
- Has less than 10 years elapsed since the date of conviction or release, whichever is later, MRE 609(c)?
- The degree to which a conviction of the crime is indicative of veracity.
- Does the evidence have significant probative value on the issue of credibility?

Weigh prejudicial effect, MRE 609(a)(2)(B) and (b);

- Determine the prior conviction's similarity to the charged offense?
  - The more similar the prior offense, the greater the prejudice and vice versa.
- Possible effects on the decisional process if admitting the evidence causes a defendant to elect not to testify. The prosecutor is not required, in all cases, to seek a ruling on the use of prior convictions before the defendant testifies. See *People v Nelson*, 234 Mich App 454, 463 (1999).
- Determine whether the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal case, if the probative value of the evidence outweighs its prejudicial effect. MRE 403.

3. Notice of Intent to Impeach Defendant

The burden is not on the prosecutor in all cases to initiate a ruling regarding the use of a defendant's prior convictions before the defendant testifies. *People v Nelson*, 234 Mich App 454, 463 (1999). However, a request for a prior ruling is the prudent course, especially if the use of the prior conviction is discretionary. See MRE 609(b).

4. Use

The use of such evidence should be strictly limited to its intended purpose of impeachment. See *People v Jones*, 228 Mich App 191, 200-203 (1998).

Evidence of a defendant's prior criminal conviction can be introduced in a subsequent civil case based on the same conduct. See *Waknin v Chamberlain*, 467 Mich 329, 330 (2002), which analyzed the issue under MRE 403.

M Civ JI 5.03, Impeachment by Prior Conviction of Crime, states:

> "In deciding whether you should believe a witness you may take into account the fact that [he / or / she] has been convicted of a crime and give that fact such weight as you believe it deserves under the circumstances."

CJI 2d 3.4, Defendant—Impeachment by Prior Conviction, states:

> "(1) There is evidence that the defendant has been convicted of a crime in the past.
>
> "(2) You may consider this evidence only in deciding whether you believe the defendant is a truthful witness. You may not use it for any other purpose. A past conviction is not evidence that the defendant committed the alleged crime in this case."

5. Prior Guilty Plea

The testimony given by a defendant at a prior guilty plea to one charge is admissible as substantive evidence in the subsequent trial on another charge, absent any indication that the prior testimony was given under compulsion, notwithstanding the fact that such evidence might tend to show the commission of another crime. *People v Plato*, 114 Mich App 126 (1981).

6. Prior Arrests

A trial court may allow inquiry into prior arrests or charges for the purpose of establishing witness bias where, in its sound discretion, the trial court determines that the admission of evidence is consistent with the safeguards of the Michigan Rules of Evidence. *People v Layher*, 464 Mich 756, 768 (2001). This decision modifies the holding in *People v Falkner, infra*, which held "that in the examination or cross-examination of any witness, no inquiry may be made regarding prior arrests or charges against such witness which did not result in conviction; neither may such witness be examined with reference to higher original charges which have not resulted in conviction, whether by plea or trial." *People v Falkner*, 389 Mich 682, 695 (1973).

> "[W]e believe that an exception to that rule exists where, as here, the evidence is being offered to show the witness' interest in the matter, his bias or prejudice, or his motive to testify falsely

because that witness has charges pending against him which arose out of the same incident for which defendant is on trial." *People v Yarbrough*, 183 Mich App 163, 165 (1990).

7. Standard of Review

The decision whether to allow impeachment by evidence of a prior conviction is within the trial court's sound discretion and will not be reversed absent abuse of that discretion. *People v Coleman*, 210 Mich App 1, 6 (1995). However, "[t]he erroneous admission of evidence of a prior conviction is harmless error where reasonable jurors would find the defendant guilty beyond a reasonable doubt even if evidence of the prior conviction had been suppressed." *Coleman, supra* at 7. Also see *People v Parcha*, 227 Mich App 236, 247-248 (1997).

The defendant must testify to preserve for review the issue of improper impeachment. *People v Finley*, 431 Mich 506, 526 (1988).

F. Prior Inconsistent Statements—MRE 613 and MRE 801(D)

1. Generally Admissible for Impeachment*

*See Section 2.40(I) for a discussion of this topic under the hearsay rule.

Prior inconsistent statements, verbal or otherwise, may be used to impeach the credibility of any witness, including the defendant, on material matters. *People v Pope*, 8 Mich App 231, 237 (1967), MRE 613, and MRE 801(d). The prior statement is not hearsay as it is not offered to prove the truth of the matter asserted, but only to prove that the witness in fact made the statement. *People v Rogers*, 388 Mich 513 (1972); *Merrow v Bofferding*, 458 Mich 617 (1998). The court must give a cautionary instruction that a prior inconsistent statement is not substantive evidence. *People v Durkee*, 369 Mich 618, 627 (1963). The cautionary instruction is CJI 2d 4.5.

The proper foundation for the statement must be laid. To introduce impeaching testimony, the witness to be impeached must be asked whether he or she made the statement in question to a certain person at a certain time and place and upon denial of the witness, that he or she made the statement at the time and place specified, or upon his or her refusal to admit same, a sufficient foundation has been laid for impeaching testimony. *Rogers v Blandon*, 294 Mich 699, 706-707 (1940). See also *Westphal v American Honda*, 186 Mich App 68, 71 (1990) and *People v Parker*, 230 Mich App 337 (1998).

2. An Exception

Evidence of a prior inconsistent statement of the witness may generally be used to impeach a witness, even if it tends to directly inculpate the defendant. However, *People v Stanaway*, 446 Mich 643, 692-693 (1994) provides "[a] prosecutor cannot use a statement that directly tends to inculpate the defendant under the guise of impeachment when there is no other testimony

from the witness for which his credibility is relevant to the case." *People v Kilbourn*, 454 Mich 677, 682 (1997).

> "The rule set forth in *People v Stanaway*[446 Mich 643 (1994)] is that the impeachment should be disallowed when (1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case. This is a very narrow rule. . . ." *People v Kilbourn*, 454 Mich 677, 683 (1997).

3. Inconsistent Statements

Inconsistent statements that can be used for impeachment are not limited to diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes of position. *People v Chavies*, 234 Mich App 274 (1999).

"Where a witness merely states that he does not remember he cannot be impeached by the showing of former statements regarding the facts which he claims not to have remembered. In any event the introduction of such prior statements would be of no value as affirmative evidence of the facts stated but would only serve to impeach the statement that the witness does not now remember. Thus there would be no introduction of any positive evidence by the admission of the former statements concerning the facts of the accident." *People v Durkee,* 369 Mich 618, 625 (1963). However, if the court concludes that a witness' inability to remember is a "mere sham" the witness' prior testimony may be read into the record for impeachment and substantive purposes because the witness is unavailable. *People v Walton*, 76 Mich App 1, 5 (1977); *People v Johnson*, 100 Mich App 594, 598 (1980). See also MCL 768.26 (Evidence Former Testimony).

4. Intrinsic Impeachment

MRE 613(a) provides that when a witness is being examined about a prior statement, the statement need not be shown, nor its contents disclosed to the witness, but on request it must be shown to opposing counsel and the witness.

5. Extrinsic Impeachment

MRE 613(b) provides that extrinsic evidence of a witness' prior inconsistent statement is not admissible unless the witness is given an opportunity to explain or deny the statement and the opposite party is given an opportunity to interrogate the witness about the statement, or the interest of justice requires otherwise. This rule does not apply to admissions of party opponents pursuant to MRE 801(d)(2).

*See Secion 2.30(A) for information on the use of deposition testimony at trial.

6. Deposition Testimony*

A question by question approach is the appropriate method to introduce deposition testimony into evidence in order to impeach a witness with his former testimony. *Socha v Passino*, 405 Mich 458, 469 (1979). The trial judge's refusal to admit entire deposition transcripts was not reversible error. *Id.* at 470.

7. Collateral Matter

Extrinsic evidence may not be used to impeach a witness on a collateral matter. *People v Rosen*, 136 Mich App 745, 758 (1984). "There are three kinds of facts that are not considered to be collateral. The first consists of facts directly relevant to the substantive issues in the case. The second consists of facts showing bias, interest, conviction of crime and want of capacity or opportunity for knowledge. The third consists of any part of the witness's account of the background and circumstances of a material transaction which as a matter of human experience he would not have been mistaken about if his story were true." *People v Guy*, 121 Mich App 592, 604-605 (1982). Also see *People v LeBlanc*, 465 Mich 575, 589-590 (2002).

8. Prior Consistent Statement

Prior consistent statements may be offered pursuant to MRE 801(d)(1)(B) to rebut an express or implied charge that the declarant recently fabricated the statement or a charge of improper influence or motive. See *Tome v United States*, 513 US 150 (1995); *People v Jones*, 240 Mich App 704, 706-707 (2000); *People v Brownridge*, 225 Mich App 291 (1997).

2.29 Refreshing Recollection

MRE 106 – Remainder of or Related Writings or Recorded Statements

MRE 612 – Writing or Object Used to Refresh Memory

MRE 803(5) – Hearsay Exceptions; Availability of Declarant Immaterial; Recorded Recollection

This Section provides an overview of MRE 612, 106, and 803(5). It does not address the issue of impeaching a witness by prior inconsistent statements. See Section 2.28 for a discussion of impeaching a witness with prior inconsistent statements.

A. Remainder of Related Writings or Recorded Statements—MRE 106

MRE 106 states:

"When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

B. Writing or Object Used to Refresh Memory—MRE 612

1. While testifying

"If, while testifying, a witness uses a writing or object to refresh his or her memory, an adverse party is entitled to have the writing or object produced at trial, hearing, or deposition in which the witness is testifying." MRE 612(a).

2. Before testifying

"If, before testifying, a witness uses a writing or object to refresh memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying." MRE 612(b).

3. Terms and conditions of production and use

"A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence, for their bearing on credibility only unless otherwise admissible under these rules for another purpose, those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony the court shall examine the writing or object in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial." MRE 612(c).

C. Method of Refreshing Recollection of Witness—MRE 612

In *People v Favors,* 121 Mich App 98 (1982), a criminal sexual conduct trial, the juvenile complainant recalled only part of her description of defendant's apartment, even after reviewing her prior statement. The prosecutor further attempted to refresh her memory by reading the prior statement into evidence. The Court of Appeals held that this method of refreshing recollection was improper, stating:

> "Where the memory of a witness is to be refreshed, it is not necessary and is often highly prejudicial to permit the jury to hear the substance of the statement to be employed. Where memory or recollection is being refreshed, the material used for that purpose is not substantive evidence. Rather, the material is employed to simply trigger the witness's recollection of the events. That recollection is substantive evidence and the material used to refresh is not . . . . The substance of the statement used to refresh is admissible only at the instance of the adverse party. MRE 612." *Id.* at 109.

However, the Court held the error to be harmless in light of the overwhelming evidence against defendant. *Id.*

An attorney usually refreshes a witness's recollection with a writing intended to stimulate recollection. The writing should be used only when the witness's present memory is exhausted.

D. Rule of Completeness—MRE 106

MRE 106 states what is commonly known as the rule of completeness. It permits opposing counsel to require introduction of complete portions of writings or recordings. The policy behind the rule is two-fold: (a) to avoid matters being taken out of context, resulting in false or misleading impressions; and (b) to provide the opposing attorney an opportunity to cure any prejudice created by a lack of context through later introduction of missing evidence.

For example, in *May v William Beaumont Hospital*, 180 Mich App 728 (1989), plaintiff's counsel was entitled to object to defense counsel reading only portions of a deposition when impeaching witnesses on cross-examination. Plaintiff's counsel could request the defense counsel to read other portions of the deposition that should have been contemporaneously considered by the jury in the name of fairness.

E. Introducing a Past Recorded Recollection—MRE 803(5)

Recorded Recollection.*

> "A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party." MRE 803(5).

*Recorded recollection is a hearsay exception. See Section 2.40(E).

A writing may be used to refresh a witness's memory under MRE 612, but if the memory is not refreshed and the writing qualifies as a recorded recollection under MRE 803(5), it may be read into evidence or received as an exhibit if offered by an adverse party.

In *Hewitt v Grand Trunk W R Co*, 123 Mich App 309, 321 (1983), the Court of Appeals, quoting *Jaxon v Detroit*, 379 Mich 405, 413 (1967), listed five foundational requirements that must be fulfilled before a document can be admitted under MRE 803(5):

> (a) a showing that the witness has no present recollection of the facts;
>
> (b) a showing that the witness' memory is not refreshed upon reference to the document;
>
> (c) a showing that the document is an original memorandum made by the witness from personal observation;
>
> (d) a showing that the document was prepared by the witness contemporaneously with the event and was an accurate recording of the occurrence; and,
>
> (e) a showing that the substance of the proffered writing is otherwise admissible.

More recently, in *People v Daniels*, 192 Mich App 658 (1991), the Court of Appeals determined that the following foundational requirements must be met before a memorandum or writing may be admitted into evidence under MRE 803(5).

> "Documents admitted pursuant to this rule must meet three requirements (1) the document must pertain to matters about which the declarant once had knowledge; (2) the declarant must now have an insufficient recollection as to such matters; and (3) the document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined

> by the declarant and shown to accurately reflect the declarant's knowledge when the matters were fresh in his memory. [*People v JD Williams*, 117 Mich App 505, 508-509, 324 NW2d 70 (1982).]" *Daniels, supra* at 667-668.

While the requirements in both cases are quite similar, it is uncertain why the *Daniels* court failed to address requirements set forth in *Hewitt.*

In *Hewitt, supra* at 320-322, a wrongful death action, the trial court improperly admitted a police report that contained eyewitnesses' statements concerning the accident in question. The content of the report was based not on the personal knowledge of the reporting officer but rather the statements of eyewitnesses who had not adopted the report. Furthermore, the report was not accompanied by the notes on which it was based.

In *Daniels, supra,* the declarant testified that she made statements to the police, who made a report, and that she had signed the statement after it was read to her. She later contradicted a statement in the report. The contradictory testimony went to the weight of the evidence but did not bar its admissibility. However, the court pointed out that the parties had not addressed the fact that the report contained a hearsay statement. Rather than resolve the issue, the court stated that the admission of the police report, if error, was harmless. *Id.* at 669-670.

In *Echols v Rule*, 105 Mich App 405, 411 (1981), the Court of Appeals held that a doctor's report, which was compiled two months after the last of the patient's visits, satisfied the contemporaneous requirement of *Hewitt/Jackson* because it was "drafted when the subject matter was fresh in the witness's memory." See also, *People v Kubasiak*, 98 Mich App 529, 536 (1980). The *Echols* court also held that the report could have come in under the medical records exception, MRE 803(4), if the notes had not been lost. *Echols, supra* at 411. "Similarly, the report should have been admitted under MRE 803(5)." *Id.*

However, in *People v Petrella*, 124 Mich App 745, 751-752 (1985), a criminal sexual conduct case, the Court implied that the police officer's report could not be admitted into evidence pursuant to MRE 803(5) when the notes used to prepare the report had been destroyed. They quoted the rule of *People v Rosborough*, 387 Mich 183, 194-195 (1972). The *Petrella* Court held, however, even though the notes were destroyed the report could be used for refreshing the officer's recollection. They quoted *People v Matuja*, 77 Mich App 291, 294 (1977), "when, as here, a witness testifies from memory his recollection having been stirred by a writing, his testimony is what he relates, not the writing."

2.30 Depositions and Interrogatories

MCR 2.302(B)(4)(d) – General Rules Governing Discovery

MCR 2.308 – Use of Depositions in Court Proceedings

MRE 106 – Remainder of or Related Writings or Recorded Statements

MRE 613 – Prior Statements of Witnesses

MRE 801(d)(2) – Hearsay; Definitions

MRE 803(18) – Hearsay Exception; Deposition Testimony of an Expert

MRE 804(b)(5) – Hearsay Exceptions; Deposition Testimony

M Civ JI 4.11 – Consideration of Deposition Evidence

A. Use of Depositions at Trial

Ordinarily, depositions are considered hearsay. *Shields v Reddo*, 432 Mich 761, 766 (1989). However, there are exceptions, MRE 801(d)(2), MRE 803(18) and MRE 804(b)(5). Depositions may be used as long as they are admissible under the rules of evidence. *Shields v Grandstaff*, 161 Mich App 175, 178 (1997).

The trial court's use of depositions is governed by MCR 2.308, subject to the Michigan Rules of Evidence. The party seeking admission bears the burden of proof under MCR 2.308(A)(1) and admission is at the discretion of the court. *Shields, supra*. If it is used at trial, the deposition must be filed with the court or made an exhibit. MCR 2.302(H)(1)(b). The jury instruction explaining deposition evidence is M Civ JI 4.11.

While depositions of an opposing party may be used for any purpose, the admissibility of such evidence is still controlled and limited by the rules of evidence. *Lenzo v Maren Engineer Corp*, 132 Mich App 362, 366 (1984).

A question by question approach is the appropriate method to introduce deposition testimony into evidence in order to impeach a witness with his former testimony. *Socha v Passino*, 405 Mich 458, 469 (1979). The question by question approach allows counsel to objection to specific questions and the court to rule upon them. *Id.* The trial judge's refusal to admit deposition transcripts was not reversible error. *Id.* at 470.

MCR 2.308(C)(3)(a) addresses objections during a deposition:

> "(a) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of a deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time."

B. Use of Interrogatories at Trial

The Court of Appeals, in *DaFoe v Mich Brass & Electric*, 175 Mich App 565, 568 (1989), stated:

> "The question whether to admit interrogatories at trial is a matter within the sound discretion of the trial judge. *Marchand v Henry Ford Hospital*, 398 Mich 163, 169-170; 247 NW2d 280 (1976). A trial judge does not abuse his discretion by refusing to admit interrogatories at trial which have already been answered by testimony, or which are irrelevant to the issues. *Masters v Highland Park*, 97 Mich App 56, 59-60; 294 NW2d 246 (1980), lv den 409 Mich 937 (1980)."

2.31 Self-Incrimination

US Constitution, Amendment V

Constitution of 1963, Art 1, Sec 17

MCL 600.2159 – Parties as Witnesses; Depositions; Comment on Failure of Criminal Defendant to Testify

A. Caution to Witness

The following is a suggested script for cautioning a witness:

> "I caution you that under the State and Federal Constitutions, you cannot be compelled to be a witness against yourself. In other words, you do not have to give testimony that might incriminate you. You have a right to be represented by a lawyer, and you have a right to consult with a lawyer about the rights I have just described.
>
> "If you do not want to answer a question, you may state that you are asserting your right to remain silent. I may then have to decide if you can be required to answer.
>
> "Do you understand everything I have told you?
>
> "Do you wish to testify (or continue to testify)?"

If the court should determine that it is necessary to advise the witness' of his or her Fifth Amendment rights, the advice should be given out of the presence of the jury. *People v Avant*, 235 Mich App 499, 512-517 (1999).

There is no requirement that there be an on-the-record waiver of a defendant's right to testify. *People v Harris*, 190 Mich App 652, 661 (1991). The trial

court has no duty to inquire into the defendant's waiver of the right to testify. *People v Bell*, 209 Mich App 273, 277 (1995).

B. Assertion of Privilege*

*For more information on privileges see Section 2.10.

Privilege Against Self-Incrimination. In *People v Dyer*, 425 Mich 572, 578-579 (1986), the Supreme Court discussed the privilege against self-incrimination:

> "This privilege is held by the witness. However, the witness is not the sole judge of whether the testimony is or may be incriminating. The constitutional privilege against self-incrimination must not be asserted by a witness too soon, that is, where there is no reasonable basis for a witness to fear incrimination from questions which are merely preliminary. However, a trial court may compel a witness to answer a question only where the court can foresee, as a matter of law, that such testimony could not incriminate the witness." [Citations omitted.]

In *People v Poma*, 96 Mich App 726, 731 (1980), the court held that when a witness on the stand asserts his or her Fifth Amendment privilege prejudice may result to the defendant because often a jury will illogically infer guilt. The Court stated the following:

> "Great care should be exercised by both the trial court and the prosecution to prevent such inferences and to preserve a defendant's right to a fair trial. When the court is confronted with a potential witness who is intimately connected with the criminal episode at issue, protective measure must be taken. The court should first hold a hearing outside the jury's presence to determine if the intimate witness has a legitimate privilege, as was done in the instant case. This determination should be prefaced by an adequate explanation of the self-incrimination privilege so the witness can make a knowledgeable choice regarding assertion. . . . We do not believe that the burden of comprehending the privilege should rest with the witness; the responsibility of informing must be the court's." *Id.* [Citations omitted.]

It is improper to call a witness knowing they will assert their Fifth Amendment privilege. *People v Dyer*, 425 Mich 572, 580-583 (1986); *People v Poma*, 96 Mich App 726, 733 (1980); and *People v Paasche*, 207 Mich App 698, 708-712 (1994).

C. The Privilege Applies in All Proceedings

In *Phillips v Diehm*, 213 Mich App 389, 399-400 (1995), the Court of Appeals stated:

> "The privilege against self-incrimination not only permits a person to refuse to testify against himself[or herself] at a criminal trial in which he[or she] is a defendant, but also permits him[or her] not to answer official questions put to him[or her] in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him[or her] in future criminal proceedings. *Allen v Illinois*, 478 U.S. 364, 368; 106 SA.Ct. 2988; 92 L.Ed.2d 296 (1986); *In re Stricklin*, 148 Mich. App. 659, 663; 384 N.W.2d 833 (1986). However, the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the amendment does not preclude the inference where the privilege is claimed by a party to a civil cause. *Baxter v Palmigiano*, 425 U.S. 308, 318; 96 S.Ct. 1551; 47 L.Ed.2d 810 (1976)."

A guilty plea does not waive the privilege against self-incrimination at sentencing. *Mitchell v United States*, 526 US 314 (1999).

D. Evidence of Silence

> "[T]he rule of [*People v*] *Bigge*, [288 Mich 417 (1939)], like MRE 801(d)(2)(B), concerns tacit admissions. 'The *Bigge* rule denies admissibility [of tacit admissions] because the inference of relevancy rests solely on the defendant's failure to deny.' [*People v*] *McReavy,* [436 Mich 197, 213 (1990)]. *Bigge* precludes the admission of a defendant's silence in the face of accusation as substantive evidence of his guilt. The Court has clarified that a defendant's prearrest silence is admissible for impeachment purposes. *People v Cetlinski (After Remand)*, 435 Mich 742, 757; 460 NW2d 534 (1990). *Celinski* held:
>
> > '[N]onverbal conduct by a defendant, a failure to come forward, is relevant and probative for impeachment purposes when the court determines that it would have been 'natural' for the person to have come forward with the exculpatory information under the circumstances.' [*Id.* at 760.] *People v Cetlinski (After Remand)*, 435 Mich 742, 757 (1990) (internal citations omitted). *People v Hackett*, 460 Mich 202, 213 (1999).
>
> "The issue of prearrest silence is one of relevance. *Id.* at 757.
>
> * * *
>
> "*Bigge's* application is limited to tacit admissions, in the form of a defendant's failure to deny an accusation. Tacit admissions under the *Bigge* rule may not be used as substantive evidence of a

> defendant's guilt. A criminal defendant's failure to respond to an accusation is not probative evidence of the truth of the accusation.
>
> "We conclude that *Bigge* is inapplicable to the resolution of this case. The silence referenced by the prosecutor did not occur in the face of an accusation. There is simply no statement that defendant's silence can be construed as tacitly adopting." *People v Hackett*, 460 Mich 202, 213-215 (1999).

Where defendant did not directly admit his involvement, his responsive answers to some questions, i.e., that his landlord was not involved, that he was not saying that he was not involved, and that he would "clear it all up tomorrow," were tacit indications of guilty knowledge. These are statements of a party opponent under MRE 801(d)(2)(A), which are admissible if relevant. *People v McReavy*, 436 Mich 197, 213 (1990).

Additionally, a cellmate's testimony regarding a nonverbal response by the defendant to an inquiry regarding her admission of guilt was not use of silence as substantive evidence of guilt contrary to the Fifth Amendment. Rather, it related part of a conversation in which the defendant actively took part, and, thus, was admissible. *People v Bushard*, 444 Mich 384 (1993).

2.32 Lay Opinions

MRE 701 – Opinion Testimony by Lay Witnesses

A. Distinction Between Lay and Expert Testimony

The Michigan Court of Appeals noted the difference between testimony by a lay witness and expert witness in *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 455 (1995):

> "Lay witness testimony in the form of an opinion is permitted where it is rationally based on the witness' perception and helpful to a clear understanding of the witness' testimony or the determination of a fact at issue. MRE 701. An expert witness is one who has been qualified by knowledge, skill, experience, training, or education and is used where scientific, technical, or other specialized knowledge will assist the trier of fact to understand evidence or determine a fact at issue. MRE 702."

B. Physical Observation

"Any witness is qualified to testify as to his or her physical observations and opinions formed as a result of them." *Lamson v Martin (After Remand)*, 216 Mich App 452, 459 (1996).

C. Value of Property

A lay witness may testify about the value of his or her real property, *Grand Rapids v Terryberry Co*, 122 Mich App 750, 754-756 (1983), or personal property, *People v Watts*, 133 Mich App 80, 83-84 (1984). Also see MRE 1101(8) regarding hearsay on value at a preliminary examination.

D. Medical Opinions

On medical questions, a lay witness may testify to what he or she knows, if the medical question does not need to be established by expert medical testimony. For example, a lay witness may testify to something simple he or she could observe, like his or her bone was broken because of an accident. However, he or she may not be qualified to testify to the causal link between the injury and an accident in more complicated cases, such as when it is necessary to determine whether an incident exacerbated a prior injury and required surgery. See *Gibson v Traver*, 328 Mich 698, 702 (1950); *Walton v Gallbraith*, 15 Mich App 490 (1969); *Leavesly v Detroit*, 96 Mich App 92 (1980); and *Howard v Feld*, 100 Mich App 271, 273-274 (1980).

2.33 Scientific Expert Testimony

MCL 600.2164 – Expert Witnesses

MCL 600.2955 – Scientific or Expert Opinion or Evidence

MRE 702 – Testimony by Experts

MRE 703 – Bases of Opinion Testimony by Experts

MRE 704 – Opinion on Ultimate Issue

MRE 705 – Disclosure of Facts or Data Underlying Expert Opinion

MRE 706 – Court-Appointed Experts

MRE 707 – Use of Learned Treatises for Impeachment

MRE 803(18) – Hearsay Exception for Deposition Testimony of an Expert

A. Statute

MRE 702 provides the standard for admissibility of expert testimony:

> "If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an

> expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

The staff comment to amended MRE 702 states as follows:

> "The July 22, 2003, amendment of MRE 702, effective January 1, 2004, conforms the Michigan rule to Rule 702 of the Federal Rules of Evidence, as amended effective December 1, 2000, except that the Michigan rule retains the words 'the court determines that' after the word 'If' at the outset of the rule. The new language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. See *Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and *Kumho Tire Co, Ltd v Carmichael,* 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999). The retained words emphasize the centrality of the court's gatekeeping role in excluding unproven expert theories and methodologies from jury consideration."

Daubert applies to scientific expert testimony; *Kumho Tire* applies *Daubert* to nonscientific expert testimony (e.g., testimony from social workers and psychologists or psychiatrists). *Daubert, supra,* 509 US at 593–94, contains a nonexhaustive list of factors for determining the reliability of expert testimony, including testing, peer review, error rates, and acceptability within the relevant scientific community. See also MCL 600.2955, which governs the admissibility of expert testimony in tort cases, and which contains a list of factors similar to the list in *Daubert.*

B. *Daubert* Test

Effective January 1, 2004, Michigan adopted the Daubert test with the amendment of MRE 702.

In determining the admissibility of scientific evidence, the court, as gatekeeper, should consider (1) whether the scientific theory or technique can be tested and has been tested, and (2) whether there has been peer review or publication of the theory or technique. *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993). The U.S. Supreme Court has applied *Daubert* to all expert evidence. *Kumho Tire Co, Ltd v Carmichael*, 526 US 137 (1999). 'The Court in *Daubert*, concludes the gatekeeper discussion by indicating that "general acceptance" still has a bearing on the inquiry. . . . The *Daubert* Court's final observation is also pertinent here: "[T]he Rules of Evidence — especially Rule 702 — do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."' *Berry v City of Detroit,* 25 F3d

1342 (6th Cir 1994), (quoting *Daubert* at 2799). The decision to admit or exclude such evidence is reviewed for an abuse of discretion. *General Electric Co v Joiner*, 522 US 136 (1998).

C. Number

No more than three experts on the same issue are allowed on either side unless the court, exercising its discretion, permits more. MCL 600.2164(2).

D. Undisclosed Experts

In determining whether to allow undisclosed expert testimony, the court of appeals has provided a list of factors for judges to use in imposing sanctions. *Dean v Tucker*, 182 Mich App 27, 32-33 (1990). The sanction of barring the expert's testimony should be exercised with caution. *Id.* at 32. See also *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 451 (1995).

E. Fees

Unless the court determines a witness is an expert witness, they shall only receive ordinary witness fees. MCL 600.2164. Once the court has determined a witness is qualified as an expert, the denial of expert witness fees in excess of the ordinary witness fees was an abuse of discretion. *Nostrant v Chezmemai, Inc*, 207 Mich App 334, 342 (1994). Contingency fees are prohibited for expert witnesses in medical malpractice cases. MCL 600.2169(4).

F. Discovery

Identity. Experts who are expected to testify at trial must be identified and are subject to discovery. MCR 2.302(B)(4). Presumably, a party is not required to disclose experts informally consulted or who will not testify at trial. *Nelson Drainage District v Bay*, 188 Mich App 501, 505 (1991).

Communications. Discovery is not permitted of any expert witness' written communications unless there is a showing of substantial need or undue hardship. *Backiel v Sinai Hospital of Detroit*, 163 Mich App 774, 799 (1987). See also *Nelson, supra* at 508 and *Franzel v Kerr Manufacturing Co*, 234 Mich App 600, 621-622 (1999).

Fees. Unless manifest injustice would result, the court shall require that the party seeking discovery of an expert pay the expert a reasonable fee for time spent in a deposition. MCR 2.302(B)(4)(c)(I), MCR 2.302(C), and *Ferguson v Delaware Int'l Speedway*, 164 Mich App 283, 296-297 (1987).

Extent. Discovery of facts known and opinions held by experts acquired or developed in anticipation of litigation or in preparation for trial is restricted to

the situations and methods provided for by MCR 2.302(B)(4). *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335 (1993).

G. Foundation

There are three prerequisites to the admission of expert testimony:

> (1) The witness must be an expert. The party presenting the expert has the burden of establishing the witness is qualified to express an opinion. *Davis v Link*, 195 Mich App 72, 73-74 (1992). A witness may be qualified as an expert based upon knowledge, skill, experience, training, or education. MRE 702. The court determines whether the witness qualifies as an expert. MRE 104(a).
>
> (2) There must be facts in evidence which require or are subject to an examination and analysis by a competent expert; and
>
> (3) There must be knowledge in a particular area that "belongs more to an expert than to the common man." *Cirner v Tru-Valu C U*, 171 Mich App 163, 168-169 (1988). See also MRE 702, *Mulholland v DEC Int'l Corp*, 432 Mich 395, 402-406 (1989), and *People v Beckley,* 434 Mich 691, 711 (1990).

MRE 602 requires that a witness testify based on personal knowledge. MRE 703 requires the opinion testimony of an expert witness be based upon facts or data in evidence.

H. Required

There are issues which may require expert testimony. For example, such testimony is ordinarily required in a medical malpractice case to establish the standard of care and its violation, as well as causation. MCL 600.2912d.

I. Basis for Opinion—MRE 703

Effective September 1, 2003, MRE 703 was amended to provide:

> "The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter."

This is a significant change as the prior rule did not require that the facts or data be in evidence. The prior case law addressing the judges discretion to require that the underlying facts be in evidence is no longer applicable.

The Michigan Supreme Court in *Gilbert v DaimlerChrysler Corp*, 470 Mich 749 (2004), reiterated the trial court's gatekeeper responsibility in the admission of expert testimony under amended MRE 702. The Court stated:

**Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579 (1993).

> "MRE 702 has [] been amended explicitly to incorporate *Daubert's** standards of reliability. But this modification of MRE 702 changes only the factors that a court may consider in determining whether expert opinion evidence is admissible. It has not altered the court's fundamental duty of ensuring that *all* expert opinion testimony–regardless of whether the testimony is based on 'novel'[52] science–is reliable.
>
> ---
>
> [52] See, e.g., *People v Young*, 418 Mich 1, 24; 340 NW2d 805 (1983). Because the court's gatekeeper role is mandated by MRE 702, rather than *Davis-Frye*, the question whether *Davis-Frye* is applicable to evidence that is not 'novel' has no bearing on whether the court's gatekeeper responsibilities extend to such evidence. These responsibilities are mandated by MRE 702 irrespective of whether proffered evidence is 'novel.' . . ."
>
> ---
>
> *Gilbert, supra* at 781.

The Court also indicated that the trial court must focus its MRE 702 inquiry on the data underlying the expert opinion and must evaluate the extent to which the expert extrapolates from that data in a manner consistent with *Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579 (1993). *Gilbert, supra,* at 782.

J. Opinion on Ultimate Issue—MRE 704

The function of an expert witness is to supply expert testimony. This testimony includes opinion evidence, when a proper foundation is laid, and opinion evidence may embrace ultimate issues of fact. However, the opinion of an expert may not extend to the creation of new legal definitions and standards and to legal conclusions. *Downie v Kent Products, Inc*, 420 Mich 197, 205 (1984). Further, an expert witness is not permitted to tell the jury how to decide the case. *People v Drossart*, 99 Mich App 66, 79 (1980). A "witness is prohibited from opining on the issue of a party's negligence, the criminal responsibility of an accused, or [the accused's] guilt or innocence." *Id.* at 79-80. Therefore, it is error to permit a witness to give the witness' own opinion or interpretation of the facts because doing so would invade the province of the jury. *Id.* at 80. An expert witness also may not give testimony regarding a question of law, because it is the exclusive responsibility of the trial court to find and interpret the law. *Charles Reinhart Co v Winiemko*, 444

Mich 579, 592 (1994); *Carson Fischer Potts and Hyman v Hyman*, 220 Mich 116, 122-123 (1996).

K. Report

The court rules and Rules of Evidence do not directly address the introduction of the expert's report as evidence. Arguably, it is hearsay or cumulative, but see MRE 1006* regarding a summary as an exhibit. Also, the Court of Appeals in *Swanek v Hutzel Hosp,* 115 Mich App 254, 260 (1982), held that the use of a doctor's report or letters is properly disclosed on cross-examination pursuant to MRE 705, and their admission is left to the discretion of the trial court pursuant to MRE 703.

*See Section 2.48.

The court may not have the authority to require an expert to prepare a report because this would require the expert to disclose his or her unwritten observations. See *People v Phillips*, 246 Mich App 201, 202-203 (2001).

A court should not limit an expert's testimony to the information in their report. *People v Webb*, 458 Mich 265, 278 (1998).

L. Court Appointed Expert

The court is authorized to appoint expert witnesses in criminal cases. MCL 775.15. MRE 706 contemplates the court's appointment of an expert in any case.

In *Carson Fischer Potts and Hyman v Hyman*, 220 Mich App 116, 121 (1996), the Michigan Court of Appeals found that a trial court may not "delegate specific judicial functions to an 'expert witness.' It is within the peculiar province of the judiciary to adjudicate upon and protect the rights and interests of the citizens, and to construe and apply the laws. Thus, the trial court could not delegate its functions of making conclusions of law, reviewing motions, requiring the production of evidence, issuing subpoenas, conducting and regulating miscellaneous proceedings, examining documents and witnesses, and preparing final findings of fact." [Citations omitted.]

M. Motion to Strike

A party must move to strike an expert within a reasonable time after learning the expert's identity and basic qualifications. The failure to timely do so results in forfeiture of the issue. *Cox v Flint Hosp Mgrs (On Rem)*, 243 Mich App 72, 80 (2000).

See *Dean v Tucker*, 182 Mich App 27, 32-33 (1990) for factors to be considered in deciding whether to bar expert witness as a sanction.*

*See Section 3.30(C) for a listing of the factors found in *Dean v Tucker*.

N. Jury Instructions

Civil. No instruction recommended. M Civ JI 4.10 – Weighing Expert Testimony

Criminal. CJI 2d 5.10 – Expert Witness

O. MCL 600.2955–Expert Scientific Opinion, Admissibility: Court Determination; Factors; Novel Scientific Evidence; Medical Malpractice Actions

In wrongful death and personal injury cases the scientific opinion must meet the requirements of MCL 600.2955. The statute contains seven factors that must be considered. Whether this statute may preclude evidence admissible under the current version of MRE 702 has not been resolved. MCL 600.2955 states:

> "(1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
>
> > "(a) Whether the opinion and its basis have been subjected to scientific testing and replication.
> >
> > "(b) Whether the opinion and its basis have been subjected to peer review publication.
> >
> > "(c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
> >
> > "(d) The known or potential error rate of the opinion and its basis.
> >
> > "(e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, 'relevant expert community' means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.

> "(f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> "(g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

"(2) A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.

"(3) In an action alleging medical malpractice, the provisions of this section are in addition to, and do not otherwise affect, the criteria for expert testimony provided in section 2169."

P. Standard of Review

The decision whether to admit expert testimony is within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of discretion. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 402 (1989); *People v Beckley*, 434 Mich 691, 711 (1990); *Franzel v Kerr Manufacturing Co*, 234 Mich App 600, 620 (1999); *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204 (1990); and *People v Badour*, 167 Mich App 186, 192 (1988).

The qualifications of an expert rest in the discretion of the trial court, and will not be reversed on appeal absent an abuse of discretion. *Cox v Flint Hosp Mgrs (On Remand)*, 243 Mich App 72, 81 (2000). It is the party offering the expert that has the burden of showing that the expert has the necessary qualifications. *Siirila v Barrios*, 398 Mich 576 (1976).

The standard of review for the admission of scientific evidence is an abuse of discretion. *General Electric Co v Joiner*, 522 US 136; 118 S Ct 512 (1998).

The trial court abuses its discretion in an evidentiary matter where its ruling has no bases in law or fact. *Mulholland v DEC Int'l Corp*, 432 Mich 395 (1989).

Also see the following sections:

- Section 2.34, Syndrome Evidence;
- Section 2.35, Medical Malpractice—Expert Testimony.
- Section 2.36, Police Witnesses; and

2.34 Syndrome Evidence

MRE 702 – Testimony by Experts

A. Rule – MRE 702

> "If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." MRE 702.

B. Battered Woman Syndrome

The Michigan courts have held that expert testimony on the "generalities or characteristics" associated with battered woman syndrome is admissible for the narrow purpose of describing the victim's distinctive pattern of behavior that was brought out at trial. *People v Daoust*, 228 Mich App 1, 10 (1998); *People v Christel,* 449 Mich 578, 591 (1995); *People v Wilson*, 194 Mich App 599, 605 (1992).

Expert testimony relating to the characteristics associated with battered woman syndrome is admissible when the witness is properly qualified and the testimony is relevant and helpful to the jury's evaluation of the complainant's credibility. *People v Christel*, 449 Mich 578, 580 (1995). The expert's testimony is admissible to explain the complainant's behavior, as that behavior is similar to the characteristics and general patterns of battered woman syndrome, but the testimony is not admissible to express the expert's opinion of whether the complainant was a battered woman or comment on the complainant's honesty. *Id.*; *Wilson, supra*.

C. Sexually Abused Child Syndrome

In *People v Peterson*, 450 Mich 349, 352 (1995), modified 450 Mich 1212 (1995), the Michigan Supreme Court reaffirmed and modified its holding in *People v Beckley*, 434 Mich 691 (1990), by reiterating that:

- An expert may not testify that the sexual abuse occurred.
- An expert may not vouch for the veracity of a victim.
- An expert may not testify whether the defendant is guilty.

The Supreme Court in *Peterson*, *supra* at 352-353, clarified aspects of child sexual abuse expert testimony by holding that (1) an expert may testify in the prosecutor's case-in-chief (rather than only in rebuttal) regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed as inconsistent with that of an actual abuse victim; and (2) an expert may testify regarding

consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility. *Id*.

Further, the Supreme Court specified two circumstances in which expert testimony is admissible to show that the victim's behavior was consistent with sexually abused victims generally:

> "Unless a defendant raises the issue of the particular child victim's postincident behavior or attacks the child's credibility, an expert may not testify that the particular child victim's behavior is consistent with that of a sexually abused child." *Id.* at 373-374.

In a case involving a child complainant's post-incident behavior of attempting suicide, the Michigan Supreme Court, in *People v Lukity,* 460 Mich 484, 500-501 (1999), found no abuse of discretion by the trial court in admitting expert testimony comparing the child victim's behavior with that of sexually abused children. In *Lukity*, the defendant was convicted of first-degree criminal sexual conduct against his 14-year-old daughter. At trial, the complainant testified that defendant sexually assaulted her over 40 times during a two-year period. She also testified that, after reporting the sexual assaults, she attempted suicide. During the defense opening statement, the defense counsel stated that the complainant had "serious problems" that could have affected her ability to "recount and describe." The defense theory of the case was that complainant's testimony was not believable, since she had emotional problems unrelated to the sexual abuse. An expert witness testified to the general characteristics of sexual abuse victims, including specific testimony regarding complainant's psychiatric behaviors being consistent with those of sexual abuse victims. The expert did, however, acknowledge that some characteristics of sexual abuse victims, such as attempting suicide, were also consistent with other types of traumas. The Michigan Supreme Court, applying *Peterson*, found no error requiring reversal in the admission of this expert testimony:

> "[The defense] theory raised the issue of complainant's post-incident behavior, e.g., her suicide attempts. Under *Peterson*, raising the issue of a complainant's post-incident behavior opens the door to expert testimony that the complainant's behavior was consistent with that of a sexual abuse victim. Accordingly, the trial court did not abuse its discretion in allowing [the expert] to testify.
>
> "Moreover, defendant effectively cross-examined [the expert] and convincingly argued in closing that the fact that a behavior is 'consistent' with the behavior of a sexual abuse victim is not dispositive evidence that sexual abuse occurred. Specifically, he argued that 'almost any behavior is not inconsistent with being a victim of sexual assault.'" *Lukity*, *supra* at 501-502.

In *People v Smith*, the case consolidated with *Peterson*, the Michigan Supreme Court found "an almost perfect model for the limitations that must

be set in allowing expert testimony into evidence in child sexual abuse cases." 450 Mich at 381. In that case, the victim delayed reporting the abuse for five years, but the defendant did not ask the victim any questions suggesting that the delay in reporting was inconsistent with the alleged abuse or attack the victim's credibility. The trial court allowed a single expert to clarify, during the prosecutor's case-in-chief, that child sexual abuse victims frequently delay reporting the abuse. The expert's testimony helped to dispel common misperceptions held by jurors regarding the reporting of child sexual abuse, rebutted an inference that the victim's delay was inconsistent with the behavior of a child sexual abuse victim, and did not improperly bolster the victim's credibility. *Id.* at 379-380. For a case in which an expert witness improperly vouched for the child's credibility, see *People v Garrison (On Remand)*, 187 Mich App 657, 659 (1991) (expert witness testified that child's use of anatomically correct dolls "demonstrated that she had indeed been sexually abused").

D. Adult Sex Offenders — Child Victims

Expert testimony may also be admissible regarding patterns of behavior exhibited by adult sex offenders to desensitize child victims. *People v Ackerman*, 257 Mich App 434, 442-445 (2003).

2.35 Medical Malpractice—Expert Testimony

MCL 600.2169 – Qualifications of Expert Witness in Action Alleging Medical Malpractice

MRE 702 – Opinion Testimony by Lay Witnesses

A. Constitutionality of MCL 600.2169(1)

MCL 600.2169(1) sets forth requirements for the qualifications of an expert witnesses to testify regarding the standard of care in medical malpractice cases.

MRE 702 requires the court to determine the qualification of an expert witness.

MCL 600.2169 does not impermissibly infringe on the Supreme Court's constitutional rule-making authority over practice and procedure. *McDougall v Schanz*, 461 Mich 15, 37 (1999).

B. Standard of Care

Expert testimony is normally required to establish the standard of care and its violation in most cases. A determination should be made whether the standard

of care is local or national and also whether a potential expert can testify as to a particular specialty, if one is involved.

"Generally, expert testimony is required in a malpractice case to establish the applicable standard of care and to demonstrate that the professional breached that standard. Although the applicable standard of care for general practitioners is that of the local community or similar communities, the standard of care for a specialist is nationwide. It is clear that interns and residents are not 'specialists,' and, therefore, we conclude that the applicable standard of care for such persons is that of the local community or similar communities." *Bahr v Harper-Grace Hospital*, 198 Mich App 31, 34 (1993). [Citations omitted.]

It should be established that the "expert knows the standard and what the standard was before questioning as to what the standard would have required." *Id.* at 35.

If the physician is held to a local standard of care, the plaintiff must show that the expert witness had knowledge of the standard of care in that medical community or in similar communities. *Id.*

The defendant physician may be examined regarding the standard of care that is applicable to himself. See *Rice v Jaskolski*, 412 Mich 206 (1981) and *Giacobazzi v Fetzer*, 6 Mich App 308 (1967).

C. Causation, Diagnosis, and Prognosis

Expert testimony is also ordinarily required on causation, diagnosis and prognosis, although a lay witness can testify about a matter within his knowledge that does not require expert testimony. *Gibson v Traver,* 328 Mich 698, 702 (1950) (lay witness could testify he had broken collarbone); *Walton v Gallbraith*, 15 Mich App 490 (1969) (plaintiff could testify about pain in neck after rearend collision and expert testimony is not required regarding causation); and *Leavesly v Detroit*, 96 Mich App 92 (1980) (expert testimony required that plaintiff had fractured vertebra).

D. Exceptions to Requirement of Expert Testimony

There may be two exceptions to the requirement that an expert testify as to the standard of care in a medical malpractice action:

- If the alleged negligence is a "matter of common knowledge and observation," expert testimony is not required.
- If the elements res ipsa loquitor are satisfied, negligence may be inferred.

Thomas v McPherson Center, 155 Mich App 700, 705 (1986).

E. Specialists and the Standard of Care

> "It is within the trial court's discretion to determine whether a witness is qualified as an expert.
>
> "A witness must possess the necessary learning, knowledge, skill, or practical experience in order to competently testify regarding a given area of medicine. A specialist may testify with regard to a general practitioner's compliance with the requisite standard of care of a general practitioner as long as the witness has knowledge of the standard of care about which the witness is testifying. Moreover, the specialist may, if qualified, testify concerning the general practitioner's standard of care.
>
> "A witness who is a member of one medical school of thought may testify regarding the standard of care applicable to members of another school of thought provided the witness is familiar with the applicable standard of care. Lastly, what is determinative is not the geographical area in which the proposed expert practices, but whether the proposed expert is knowledgeable regarding the practice of the area in question." *Mazey v Adams*, 191 Mich App 328, 331-332 (1991). [Citations omitted.]

A plaintiff's expert witness needed only to be board certified in the single specialty that formed the basis of plaintiff's medical malpractice complaint to be able to testify against a defendant-doctor who is board certified in several specialties. *Tate v Detroit Receiving Hospital*, 249 Mich App 212, 220 (2002).

F. Hospitals

"[V]iolation of a regulation promulgated pursuant to statutory authority is admissible in a medical malpractice action," but hospital policies do *not* establish the standard of care or its violation and are generally inadmissible. *Gallagher v Detroit-Macomb Hospital*, 171 Mich App 761, 764-768 (1988).

A hospital incident report or peer review record may be inadmissible under MCL 333.20175(5) and MCL 333.21515. See also *Gallagher, supra* at 769-770.

G. Discovery

MCR 2.302(B)(4) and (C). The party deposing an opposite party's expert is responsible for his fees for the deposition. *Ferguson v Delaware Int'l Speedway*, 164 Mich App 283, 296-297 (1987).

Defendant's attorneys are entitled to communicate ex parte with plaintiff's treating physician. Pursuant to MCR 2.314(A)(1)(b), when the mental or physical condition of a party is in controversy, medical information is subject

to discovery. Accordingly, once the patient allows discovery of medical information, there are no grounds for restricting access to the patient's physician. *Davis v Dow Corning Corp*, 209 Mich App 287 (1995). See also *Domako v Rowe,* 438 Mich 347 (1991).

H. Challenges to Qualifications

A parties failure to challenge an expert's basic qualifications under MCL 600.2169(1)(a) within a reasonable time after learning the expert's identity results in a forfeiture of the issue.

Where plaintiff deposed defendant's expert almost a year before the trial and waited until a month before the trial to challenge qualifications, plaintiff forfeited the right to challenge the expert's qualifications. See *Greathouse v Rhodes,* 242 Mich App 221 (2000).

There is no requirement for an expert witness to prepare a report where no such report was created or existed and the trial court does not have the authority to compel an expert to disclose unwritten observations. *People v Phillips*, 246 Mich App 201, 202-203 (2001).

I. Cross-Examination

It is proper to bring out on cross-examination the number of times a witness testifies in court, or is involved in particular types of cases. See *Rumptz v Leahey*, 26 Mich App 438 (1970).

A pattern of testifying as an expert witness for a particular category of plaintiffs or defendants may suggest bias. However, such testimony is only minimally probative of bias and should be carefully scrutinized by the trial court. See *Wilson v Stilwill*, 411 Mich 587, 601(1981).

Prior failed surgeries by an expert witness are relevant to his competency for giving an expert opinion, about defendant physician's failure to perform a surgery correctly, which is based on the number and variety of surgeries the expert has performed. But, "the mere fact that an expert may have been named in an unrelated medical malpractice action is not probative of his truthfulness under MRE 608 or relevant to his competency or knowledge." *Wischmeyer v Schanz*, 449 Mich 469, 482 (1995).

J. Disparagement of Expert Witness

Attacks on expert witnesses as "hired guns" may require new trial. See *Wolak v Walczak*, 125 Mich App 271, 275 (1983) (court's allowance of statement characterizing expert witness as a "professional witness" who resides out of state, did not require new trial); *Wilson v Stilwill*, 411 Mich 587, 605 (1981) (statement inferring an expert witness was a "professional witness" did not require new trial); *Kern v St. Luke's Hospital Ass'n of Saginaw*, 404 Mich

339, 354 (1978) (when defense counsel "continuously raised the groundless charge, by direct attack and innuendo, that the 'bought' testimony of plaintiffs' out-of-state expert witnesses was collusive and untrue "here to do my client in" was so prejudicial that it required a new trial); *Wayne Co Rd Comm'n v GLS LeasCo*, *Inc*, 394 Mich 126, 131 (1975) (while one attack may not constitute prejudicial error, repeated attacks increase the probability of prejudice, and where an expert witness was belittled, accused of lying, and sarcastically taunted, a new trial was mandated).

2.36 Police Witness—Expert Testimony

MRE 701 – Opinion Testimony by Lay Witnesses

MRE 702 – Testimony by Experts

MRE 703 – Bases of Opinion Testimony by Experts

CJI 2d 4.14 – Tracking-Dog Evidence

CJI 2d 5.11 – Police Witness

A. Instruction—CJI 2d 5.11

Police officers frequently appear as fact witnesses, which presents no special problems, but ordinarily requires the use of CJI 2d 5.11, which indicates that his or her testimony is to be judged by the same standards used to evaluate the testimony of any other witness.

B. Lay Opinion Testimony

As with any lay witness, a police officer may be able to give opinion testimony under MRE 701. In *People v Smith*, 152 Mich App 756, 764 (1986), a police officer was permitted to give opinion testimony that defendant was trying to conceal himself. In *People v Oliver,* 170 Mich App 38, 50-51 (1988), the court accepted opinion testimony from police officers that a car had been dented by bullets.

On the other hand, police officer opinion testimony, as to the cause of an accident, is inadmissible where the officer did not see the accident and based conclusions solely upon witness statements taken after the accident. *Miller v Hensley*, 244 Mich App 528, 531 (2001).

C. Expert Testimony

However, police officers are often asked to give expert testimony. In some of the cases, the opinion evidence is a mixture of lay and expert opinion and in some cases the police officer is simply giving a lay opinion. The following are

some of the topics on which expert testimony might be sought from a police witness:

Arson — A fire department inspector has been permitted to give opinion testimony that a fire was maliciously set and that it was arson. *People v Farnsley*, 94 Mich App 34, 36 (1979). A fireman was permitted to give lay opinion testimony regarding the speed at which a building burned in *Co-Jo, Inc. v Strand*, 226 Mich App 108, 116-117 (1997).

Blood Stain Interpretation — A police detective may be permitted to give evidence regarding blood stain interpretation. *People v Haywood,* 209 Mich App 217 (1995).

Breathalyzer — See *People v Tibolt*, 198 Mich App 44, 46 (1993) and *People v Schwab*, 173 Mich App 101, 103 (1988) regarding breathalyzer test results. See *People v Peebles*, 216 Mich App 661, 667—668 (1996) regarding qualification to testify about results of field sobriety tests.

Causation — A fire department investigator was permitted to give an expert opinion as to the method used to start a fire. *People v Bar*, 156 Mich App 450, 456 (1986).

Lay opinion testimony from investigating police officers regarding fault in traffic accidents when the testimony was the result of direct observations and analysis of the accident scene is admissible. *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 455-456 (1995); *Mitchell v Steward Oldford & Sons, Inc*, 163 Mich App 622, 629-630 (1987).

However, in *Miller v Hensley*, 244 Mich App 528, 531 (2001) police officers were not permitted to testify about the cause of an accident they did not see and where their conclusions were based on witness statements.

Drug Dealing or Activity — Police expert testimony regarding drug profiles (and characteristics of drug dealers) should not be admitted as substantive evidence of the defendant's guilt. *People v Hubbard*, 209 Mich App 234, 242 (1995). The court found the reliability of drug profile evidence to be suspect and concluded its probative value was substantially outweighed by the danger of unfair prejudice. However, police officers can provide testimony about typical characteristics of drug dealing to help the fact finder understand the evidence, not as substantive evidence. *People v Murray*, 234 Mich App 46, 56 (1999); and *People v Williams*, 240 Mich App 316, 320-321 (2000). A cautionary instruction should be considered. *People v Murray, supra* at 60-61. Also see *People v Potter*, 115 Mich App 125, 130-131 (1982); *People v Sasson*, 178 Mich App 257, 258-259 (1989); *People v Ray*, 191 Mich App 706, 707-708 (1991); *People v Williams (After Remand)*, 198 Mich App 537, 541-542 (1993); and *People v Stimage,* 202 Mich App 28, 29-30 (1993).

Drug Identification — Officers were permitted to identify a substance as marijuana in *People v Adan*, 83 Mich App 326, 329 (1978). A police

laboratory report identifying a controlled substance is hearsay and is not admissible under the business record or public record exception. *People v McDaniel,* 469 Mich 409 (2003).

Firearms — A police expert in firearms identification has been allowed to testify that bullets came from the defendant's gun. *People v McPherson*, 84 Mich App 81, 83 (1978) (dicta). A police officer who fired off a sawed-off shotgun was allowed to testify about its recoil characteristics. *People v Douglas*, 65 Mich App 107, 117 (1975).

Seat Belt Use — A police officer investigating a motor vehicle accident may offer lay opinion testimony that a motorist was not wearing a seat belt based on the officer's observations at the accident scene. *Chastain v Gen Motors Corp (On Rem)*, 254 Mich App 576, 588 (2002).

Speed — A police officer has been permitted to testify about an estimated speed based on physical evidence collected and his personal observations at the crime scene shortly after the accident. *People v Ebejer*, 66 Mich App 333, 340, 343 (1976). Also see, *People v Ferency*, 133 Mich App 526, 542-544 (1984) (speed readings from a radar speed meter).

Standard of Care — In *Troyanowski v Kent City*, 175 Mich App 217, 225-226 (1988), the court upheld the trial court's exclusion of a state trooper's opinion regarding the proper standard of care for a firetruck driver. It was not admissible under MRE 701 and his qualifications were not established under MRE 702.

*See Section 2.38 on tracking dog evidence.

Tracking Dog* — CJI 2d 4.14 covers tracking dog evidence. Foundational requirements are required for tracking dog evidence. *People v Harper*, 43 Mich App 500, 508 (1972). There must be corroborating evidence to support a finding of guilt. *People v Coleman*, 100 Mich App 587 (1980); *People v Laidlaw*, 169 Mich App 84, 93-94 (1988); and *People v Stone*, 195 Mich App 600, 603 (1992).

Violation of Law — In *Jenkins v Raleigh Trucking Services*, 187 Mich App 424, 468 (1991), a police officer was permitted to give an expert opinion whether a vehicle was properly loaded. Also see *DeVoe v C A Hall, Inc*, 169 Mich App 469 (1988).

2.37 Fingerprints

CJI 2d 4.15 – Fingerprint Evidence

"Before a defendant may be convicted on the basis of fingerprint evidence, the people must prove that the prints correspond to those of the accused and were found in the place where the crime was committed under such circumstance that they could only have been impressed at the time when the crime was committed." Commentary to CJI 2d 4.15, (citing *People v Ware*, 12 Mich App

512 (1968); *People v Cullens*, 55 Mich App 272 (1974); *People v Willis*, 60 Mich App 154 (1975)).

It is the fingerprints themselves that are the evidence, and not the object on which they are found. *People v Cullens*, 55 Mich App 272, 274-275 (1974). Fingerprints are actually lifted from the object during the fingerprinting process, and the object need not be preserved. *Id.* at 273 n 1.

Two courts have permitted the use of digitally enhanced fingerprints. *State v Hayden*, 950 P2d 1024, 1028 (Wash. Ct. App. 1998) and *State v Hartman*, 754 NE 2d 1150, 1165-1166 (Ohio Supreme Court 2001).

2.38 Tracking Dog Evidence

CJI 2d 4.14 – Tracking-Dog Evidence

A. Foundation

In *People v Norwood*, 70 Mich App 53, 55 (1976), the Court stated:

> "Before tracking dog evidence is admissible in Michigan, four conditions precedent must be satisfied. First, it is necessary to show that the handler is qualified to handle the dog. Second, it must be shown that the dog was trained and *accurate* in tracking humans. Third, it is necessary to show that the dog was placed on the trail where circumstances indicate that the culprit was. Fourth, it is necessary to show that the trail had not become stale when the tracking occurred.
>
> "For a proper foundation to be laid, the prosecutor must establish that all four of the conditions are present to assure the evidence's reliability." [Citations omitted.]

B. Use

Tracking dog evidence, standing alone, will not support a conviction, but is sufficient to justify the issuance of a search warrant. *People v Coleman*, 100 Mich App 587, 591-593 (1980).

C. Jury Instruction

When tracking dog evidence is used, the court should give CJI2d 4.14. CJI 2d 4.14 is derived from *People v Perryman,* 89 Mich App 516 (1979).

D. Drug-Sniffing Dog

In *People v Clark*, 220 Mich App 240 (1996), the Court of Appeals held that a drug-sniffing dog's alert at the trunk of defendant's car created sufficient probable cause to allow the police to search the vehicle following defendant's arrest. All that is necessary to find the dog's alert to be reliable is evidence of the dog's training and current certification. *Id.* at 240. See also *United States v Wood*, 915 FSupp 1126, 1136 (D Kan, 1996).

In *United States v Place*, 462 US 696, 707 (1983), the United States Supreme Court held that "exposure of respondent's [property], which was located in a public place, to a trained canine . . . did not constitute a 'search' within the meaning of the Fourth Amendment."

Part IV—Hearsay (MRE Article VIII)

2.39 Hearsay

MRE 801 – Hearsay; Definitions

MRE 802 – Hearsay Rule

MRE 803 – Hearsay Exceptions; Availability of Declarant Immaterial

MRE 804 – Hearsay Exceptions; Declarant Unavailable

MRE 805 – Hearsay Within Hearsay

A. Hearsay Analysis

MRE 802 provides hearsay is not admissible except as provided by the rules. MRE 801(C) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Possibly the best rationale for the rule is the inability to cross-examine the witness who makes the statement when the statement is made (who is the real witness and can they be cross-examined?). In addressing a hearsay objection, the following analysis may be helpful:

- Is the proposed evidence inadmissible hearsay because:
  - It is a statement made orally or in writing or by gesture;
  - The declarant is someone other than the witness while testifying (or is it the witness' prior statement since it is still hearsay if the witness is quoting him or herself); and

- The statement is offered to prove the truth of the matter asserted;

♦ Is the proposed evidence, although apparently hearsay, admissible because offered for a non-hearsay purpose, or because it is not hearsay under MRE 801(d),* or under the exceptions contained in MRE 803 and 804?

*See subsection (C), below, for a discussion of MRE 801(d).

B. Examples

1. Who is the declarant?

"In general, testimony about a prior out-of-court identification falls into two categories: testimony by the identifier/declarant and testimony by a third-party witness to the identifier/declarant's statements. With respect to testimony by an identifier/declarant, even before the adoption of the Michigan Rules of Evidence, Michigan cases have allowed such testimony." *People v Sykes*, 229 Mich App 254, 262 (1998).

2. Is it a statement?

MRE 801(a) states:

"Statement. A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."

3. Is it offered to prove the truth of the matter?

"The trial court did not abuse its discretion in admitting the tape recording of the 911 telephone call that resulted in the police responding to the disturbance at the hall. First, the 911 tape recording was not hearsay, because it was not introduced to prove the truth of the matter asserted therein, but rather to show why the police responded. MRE 801(c); *People v Jackson*, 113 Mich. App. 620; 318 N.W.2d 495 (1982). Second, even if the tape recording were offered to prove the truth of the statements therein, it would fall within the present sense impression exception of MRE 803(1). *People v Cross*, 202 Mich. App. 138, 142; 508 N.W.2d 144 (1993). " *City of Westland v Okopski,* 208 Mich App 66, 77 (1994).

A dispatcher's statement can be offered to explain why the police did what they did after receiving the report. *People v Lewis*, 168 Mich App 255, 266-267 (1988). In *People v Pawelczak*, 125 Mich App 231, 234-235 (1983), the Court allowed the admission of statements made over the police radio because it was offered to show the motives of the police officers for pursuing the stolen vehicle and for arresting defendant rather than to prove the truth of the matter asserted. The Court had concluded that the circumstances of the arrest were relevant to prove defendant's identity as the perpetrator of the crime.

C. Not Hearsay by Definition

The MRE and case law provide that some out of court statements are not hearsay, MRE 801(d):

1. Prior statement of testifying witness, MRE 801(d)(1), and statement is:

(A) inconsistent with his or her testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition. *People v Morrow*, 214 Mich App 158 (1995); *People v Chavies,* 234 Mich App 274, 382-283 (1999).

(B) consistent with his or her testimony and is offered to rebut an express or implied charge of recent fabrication or improper influence or motive. *People v Brownridge*, 225 Mich App 291, 301-302 (1997); *People v Jones*, 240 Mich App 704 (2000).

(C) one of identification of a person made after perceiving him or her. *People v Malone*, 445 Mich 369 (1994).

2. Admission by party-opponent, MRE 801(d)(2), offered against a party, and statement is:

(A) his or her own statement, in either his or her individual or a representative capacity, except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles.

(B) a statement that he or she has manifested his or her adoption or belief in its truth. *People v Greenwood*, 209 Mich App 470 (1995).

(C) a statement by a person authorized by him or her to make a statement concerning the subject. *Fassihi v St Mary Hosp*, 122 Mich App 11 (1982).

(D) a statement by his or her agent or servant concerning a matter within the scope of his or her agency or employment, made during the existence of the relationship. *Shields v Reddo*, 432 Mich 761, 773 (1989).

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy. *People v Vega*, 413 Mich 773 (1982).

Note: A finding that a defendant's statement may be used as an admission does not preclude an objection as to relevancy.* See *People v Brown*, 120 Mich App 765 (1982).

*See Section 4.11 for more information on defendant's statements and Section 2.12 for more information on relevancy.

2.40 Hearsay Exceptions

MRE 803 – Hearsay Exceptions; Availability of Declarant Immaterial

MRE 804 – Hearsay Exceptions; Declarant Unavailable

Hearsay evidence is inadmissible unless it comes within an established exception. MRE 802; *People v Eady*, 409 Mich 356 (1980).

MRE 803 exceptions apply whether or not the witness is available, while MRE 804 applies only when the witness is unavailable.

There are many exceptions to the hearsay rule. This Section only discusses the most common exceptions.

A. Present Sense Impression—MRE 803(1)

In *Hewitt v Grand Trunk WR Co*, 123 Mich App 309, 317 (1983), (quoting *United States v Narciso*, 446 F Supp 252, 288 (ED Mich, 1977) the Court stated:

> "Underlying Rule 803(1) is the assumption that statements of perception substantially contemporaneous with an event are highly trustworthy because: (1) the statement being simultaneous with the event there is no memory problem; (2) there is little or no time for calculated misstatement; and (3) the statement is usually made to one who had equal opportunity to observe and check misstatements."

In *People v Hendrickson*, 459 Mich 229, 235-236 (1998), the Court stated:

> "The admission of hearsay evidence as a present sense impression requires satisfaction of three conditions (1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be 'substantially contemporaneous' with the event." *Id.* at 236.

Corroboration (independent evidence of the event) is required. *Id.*

B. Excited Utterance—MRE 803(2)

> "To come within the exited utterance exception to the hearsay rule, a statement must meet three criteria: (1) it must arise out of a startling occasion; (2) it must be made before there has been time to contrive and misrepresent; and (3) it must relate to the circumstances of the startling occasion." *People v Gee*, 406 Mich 279, 282 (1979).

In *People v Smith*, 456 Mich 543, 550-551 (1998) the Court clarified the requirements:

> "In *People v Straight*, 430 Mich 418, 424 (1988), this Court cited two primary requirements for excited utterances: 1) that there be a startling event, and 2) that the resulting statement be made while under the excitement caused by the event. *Straight* clarified *People v Gee*, 406 Mich 279, 282 (1979), which had split the second requirement into two inquiries: whether the statement was made before there was time to contrive and misrepresent, and whether it related to the circumstances of the startling occasion. . . . This explanation clarified that it is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule. The question is not strictly one of time, but of the possibility for conscious reflection."

There must be independent evidence of the startling event. *People v Burton*, 433 Mich 268, 294 (1989).

"However, the elements of this exception are defined, it is clear that the statement must have been made while the declarant was still in a state of nervous excitement." *Hewitt v Grand Trunk WR Co,* 123 Mich App 309, 319 (1983).

The admission of hearsay under the excited utterance exception is within the discretion of the trial court. *People v Creith*, 151 Mich App 217, 223 (1986); *Smith, supra* at 554.

C. Then Existing Mental, Emotional, or Physical Condition—MRE 803(3)

State of Mind. In *People v DeWitt*, 173 Mich App 261, 268 (1988) the Court stated:

> "The general rule in Michigan is that statements indicative of the declarant's state of mind are admissible when state of mind is an issue in the case."

The Court in *People v Fisher*, 449 Mich 441 (1995) provided further guidance:

> "Evidence that demonstrates an individual's state of mind will not be precluded by the hearsay rule. . . . Wherever an utterance is offered [into] evidence [for] the state of mind which ensued in another person in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the hearsay rule is concerned. . . . An utterance or a writing may be admitted to show the effect on the hearer or reader when this effect is relevant. The policies underlying the hearsay rule do not apply because the utterance is not being offered to prove the truth or falsity of the matter asserted." .

Physical Condition. Statements about declarant's symptoms are admissible, but it was "medically irrelevant" that the trauma occurred at work. *Cooley v Ford Motor Co*, 175 Mich 199, 203-204 (1988).

D. Statements Made for Purposes of Medical Treatment or Diagnosis—MRE 803(4)

"In order to be admitted under MRE 803(4), a statement must be made for purposes of medical treatment or diagnosis in connection with treatment, and must describe medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the injury. Traditionally, further supporting rationale for MRE 803(4) is the existence of (1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient." *People v Meebor (After Remand)*, 439 Mich 310, 322 (1992). See also *Merrow v Bofferding*, 458 Mich 617, 629 (1998) and *People v Hackney*, 183 Mich App 516, 527 (1990).

E. Recorded Recollection—MRE 803(5)*

*See Section 2.29(E) for additional information on this hearsay exception.

In order to admit evidence pursuant to MRE 803(5), the following requirements must be met:

- The document must pertain to matters about which the declarant once had knowledge;
- The declarant must now have an insufficient recollection as to such matters; and
- The document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge

when the matters were fresh in his or her memory. *People v Daniels,* 192 Mich App 658, 667-668 (1991).

In *Hewitt v Grand Trunk W R Co*, 123 Mich App 309, 321 (1983), the Court of Appeals quoted the Michigan Supreme Court's holding in *Jaxon v Detroit*, 379 Mich 405, 413 (1967) (emphasis added):

> "To qualify a writing otherwise objectionable as hearsay to be admitted in evidence as a past recollection recorded, a proper foundation must be laid. That foundation should consist in the following: (a) showing that the witness has no present recollection of the facts, (b) a showing that the witness' memory is not refreshed upon reference to the document, (c) a showing that the document is an original memorandum made by the witness from personal observation, (d) a showing that the document was prepared by the witness contemporaneously with the event and was an accurate recording of the occurrence and, (e) a showing that the substance of the proffered writing is otherwise admissible."

According to *People v Missias*, 106 Mich App 549, 554 (1981):

> "MRE 803(5) does not require a showing that the witness was totally unable to recall the memorandum's contents, but only that the witness 'now has insufficient recollection to enable him to testify fully and accurately.'"

F. Records of Regularly Conducted Activity—MRE 803(6)

In *Solomon v Shuell*, 435 Mich 104, 125-126 (1990), the Court summarized the business records hearsay exception as follows:

> "In order to ensure the same high degree of accuracy and reliability upon which the traditional, but narrowly construed business records exception was founded, the current rules also recognize that trustworthiness is the principal justification giving rise to the exception. Thus, FRE 803(6) and MRE 803(6) and MRE 902(11) provide that trustworthiness is presumed, subject to rebuttal, when the party offering the evidence establishes the requisite foundation. Even though proffered evidence may meet the literal requirements of the rule, however, the presumption of trustworthiness is rebutted where 'the source of information or the method or circumstances of preparation indicate lack of trustworthiness.'"

See also *Hewitt v Grand Trunk W R Co,* 123 Mich App 309, 322-325 (1983).

The foundation for admitting business records can be provided by the custodian, other qualified witness, or certification. MRE 803(6), MRE 902(11).

For public records exception see MCL 600.2107, MRE 803(8) and (9) and MRE 902.

G. "Reliable Hearsay"—MRE 803(24) and 804(b)(6)

MRE 803(24) provides a hearsay exception for:

> "A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant."

This rule contains five requirements for admissibility:

1) not covered by other hearsay exceptions;

2) equivalent circumstantial guarantee of trustworthiness;

3) the statement is offered as evidence of a material fact;

4) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts; and

5) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

See *People v Katt*, 468 Mich 272, 281-290 (2003) for a discussion of what constitutes a statement "not specifically covered by any of the foregoing exceptions" and the "near-miss" theory.

In *People v Welch*, 226 Mich App 461, 467-468 (1997), the Court of Appeals examined federal cases, analogized MRE 803(24) and MRE 804(b)(6) to FRE 803(24), and found that based on the totality of the circumstances, statements must bear an "adequate indicia of reliability" based on trustworthiness factors

which include (1) the statement's spontaneity; (2) consistent repetition of the statement; (3) lack of motive to fabricate; (4) the reason for inability to testify; and the court must determine that cross-examination would be "of marginal utility."

The statements of a child victim that did not fit within one of the established exceptions to the hearsay rule has been admitted under MRE 803(24). *People v Katt*, 468 Mich 272, 294 (2003).

*Section 2.25 discusses child witnesses.

H. Child's Statement* About Sexual Act—MRE 803A

MRE 803A reinstates the "tender years" exception. See Smith, *Sexual Assault Benchbook*, (MJI, 2002), Section 7.5(C) for a discussion of MRE 803A.

I. Declarant Unavailable—MRE 804, MCL 768.26

Hearsay exceptions that apply only when the declarant is unavailable are set forth in MRE 804(b). MRE 804(a) defines "unavailability." A witness who abruptly leaves the courthouse before testifying may be "unavailable". *People v Adams*, 233 Mich App 652, 658-659 (1999). The exceptions include the use of prior testimony, MRE 804(b)(1) and (5), and a statement against interest, MRE 804(b)(3).

*The next section addresses statements by a co-defendant or co-conspirator.

Prior Testimony.* The admission of prior testimonial statements violates a defendant's constitutional right to confrontation unless the prior statements were subject to cross-examination by the defendant and the person who made the statements is unavailable to testify. For confrontation clause purposes, the reliability of prior testimonial statements must not be determined by reference to rules of evidence governing admissibility of hearsay evidence, or by whether the statements bear "particularized guarantees of trustworthiness." *Crawford v Washington,* 541 US ___; 124 S Ct 1354, 1374 (2004). In *Crawford,* the United States Supreme Court overruled *Ohio v Roberts*, 448 US 56 (1980), which held that admission of an unavailable witness's prior statements did not violate the Sixth Amendment if the statements bear "adequate indicia of reliability." The Court declined to provide a comprehensive definition of "testimonial statement"; however, the Court stated:

> "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.*

The admission of an unavailable witness' former testimonial statement does not violate the Confrontation Clause if the statement is admitted to impeach a witness. *People v McPherson*, 263 Mich App 124, 133-135 (2004). In applying the U.S. Supreme Court's holding in *Crawford*, *supra,* the Court of Appeals indicated that *Crawford* does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. In *McPherson*, the statement of the co-defendant was admitted not for its

substance, but to impeach the defendant. The Court concluded that admission of the statement for impeachment purposes did not violate either *Crawford v Washington*, *supra* or the Confrontation Clause.

Statement Against Interest. For analysis of MRE 804(b)(3), a statement against interest, see *People v Washington*, 468 Mich 667, 671–674 (2003); *People v Dhue*, 444 Mich 151 (1993); *People v Barrera*, 451 Mich 261 (1996); *Davidson v Bugbee*, 227 Mich App 264, 266-267 (1997); and *People v Schutte,* 240 Mich App 713, 715–719 (2000). A statement that one intends to commit a crime is not admissible under MRE 804(b)(3). *People v Brownridge*, 225 Mich App 291, 303-304 (1997).

Prior Consistent Statements.* For a prior consistent statement, four elements must be shown to establish admissibility under MRE 801(d)(1)(B):

*Also see Section 2.28(F)(8).

(1) the declarant must testify at trial and be subject to cross-examination;

(2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony;

(3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and

(4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose. *People v Jones*, 240 Mich App 704 (2000).

If there was an adequate opportunity to cross-examine the witness at the preliminary examination, then the transcript can be used. See *People v Meredith*, 459 Mich 62, 67 (1998); *People v Dye*, 431 Mich 58, 93 (1988); *People v Missouri*, 100 Mich App 310, 334-335 (1980); and *People v Hayward,* 127 Mich App 50, 55-58 (1983). In *People v Meredith*, 459 Mich 62, 65-71 (1998), the Supreme Court concluded the preliminary examination of co-conspirators who refused to testify at trial was properly admitted.

J. Waiver

A defendant who presents a hearsay witness waives appellate review of the hearsay testimony. *People v Riley*, 465 Mich 442, 449 (2001) .

2.41 Statement of Co-Defendant or Co-Conspirator

US Constitution, Amendment VI

Constitution, of 1963, Art 1, Sec 20

MRE 801(d)(2)(E) – Hearsay; Definitions; Admission by Party-Opponent

MRE 802 – Hearsay Exceptions; Availability of Declarant Immaterial

MRE 804(b)(3) – Hearsay Exceptions; Declarant Unavailable; Statement Against Interests

CJI 2d 4.2 – Confession Not Admissible Against Codefendant

CJI 2d 5.6 – Cautionary Instruction Regarding Accomplice Testimony

A. Statement Made in Furtherance of Conspiracy

MRE 801(d)(2)(E) provides that a statement is not hearsay if:

> "(2) Admission by party-opponent. The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy."

A statement is not hearsay under MRE 801 if made by a co-conspirator or the party against whom a statement is offered and if the statement was made during the course of and in furtherance of the conspiracy. MRE 801(d)(2)(E). Independent proof must establish the conspiracy's existence by a preponderance of the evidence. *People v Vega*, 413 Mich 773, 780-782 (1982). Neither direct proof of the agreement, nor a formal agreement, need be shown to prove the conspiracy. *People v Gay,* 149 Mich App 468, 471 (1986). Circumstances, acts and conduct of the parties can sufficiently demonstrate an agreement in fact. *Id.* Circumstantial evidence and inference can be used to establish a conspiracy. *Id.* The trial judge must determine the preliminary questions regarding the admissibility of the evidence, including the existence of the conspiracy, before admitting the evidence. MRE 104(a), *Vega, supra* at 779-780. These preliminary questions cannot be left to the jury. *Id.*

Foundation Requirements. To invoke the co-conspirator hearsay exception under FRE 104(a), the government is required to prove the following foundational requirements: 1) that a conspiracy existed and that the defendant participated in it; 2) that an identified hearsay declarant and the defendant were involved in the same conspiracy; 3) that the statement was made in the course of the conspiracy; and 4) that the statement was made in furtherance of the conspiracy. *Bourjaily v United States*, 483 US 171, 175 (1987).

Decision. The trial court alone determines the admissibility of co-conspirator statements; the jury plays no role in that determination. Co-conspirator statements are admissible if they are proven by a preponderance of the evidence. *Bourjaily v United States, supra*. No inquiry concerning the Confrontation Clause need be made concerning a proposed co-conspirator statement if evidence has established that the statement is in fact a co-conspirator statement. See *United States v Inadi*, 475 US 387, 400 (1986).

B. Inculpatory Statements

The Confrontation Clause of the Sixth Amendment is violated when the confession of one defendant, implicating another defendant, was placed before the jury at the defendants' joint trial and the confessing defendant did not take the witness stand and was therefore not subject to cross-examination. This was a violation even though the court gave the jury a cautionary instruction that the confession was to be considered only as evidence against the confessing defendant. *Bruton v United States*, 391 US 123 (1968).

The admission of prior testimonial statements violates a defendant's constitutional right to confrontation unless the prior statements were subject to cross-examination by the defendant and the person who made the statements is unavailable to testify. For Confrontation Clause purposes, the reliability of prior testimonial statements must not be determined by reference to rules of evidence governing admissibility of hearsay evidence, or by whether the statements bear "particularized guarantees of trustworthiness." *Crawford v Washington*, 541 US ___; 124 S Ct 1354, 1374 (2004). In *Crawford*, the United States Supreme Court overruled *Ohio v Roberts*, 448 US 56 (1980), which held that admission of an unavailable witness' prior statements did not violate the Sixth Amendment if the statements bear "adequate indicia of reliability." The Court declined to provide a comprehensive definition of "testimonial statement"; however, the Court stated:

> "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.*

Before the co-defendant's statement may be admissible, the co-defendant must be unavailable as a witness. *People v Dhue*, 444 Mich 151, 163 (1993). A co-defendant who exercises his Fifth Amendment privileges is unavailable as a witness. *Richardson, supra* at 74. Also see *People v Meredith*, 459 Mich 62 (1998).

The Confrontation Clause is not violated by the admission of a nontestifying co-defendant's confession that is redacted to eliminate the defendant's name and any other reference to the defendant's existence. *Richardson v Marsh,* 481 US 200 (1987).

The U.S. Supreme Court has held that merely redacting the co-defendant's name and replacing it with a blank, or the term deleted, or some other symbol, still points too directly at the jointly tried co-defendant and violates the Confrontation Clause. The Court indicated that more extensive redacting would have been acceptable. *Gray v Maryland*, 523 US 185 (1998).

If the nontestifying co-defendant's confession is introduced in rebuttal to impeach a testifying defendant's explanation of his or her own confession, and the jury is properly instructed that the nontestifying co-defendant's

confession is not to be considered for its truth, the Confrontation Clause is not violated and *Bruton, supra,* does not apply. See *Tennessee v Street*, 471 US 409 (1985).

C. Exculpatory Statement

In *People v Barrera,* 451 Mich 261, 276-277 (1996), the court held a co-defendant's statement offered as exculpatory evidence should have been admitted. The court considered the admissibility under MRE 804(b)(3), analyzed whether it was against penal interest and considered its trustworthiness. The court concluded that the totality of the circumstances tested espoused in *People v Dhue,* 444 Mich 151 (1993), should be applied.

D. Cautionary Instruction—CJI 2d 5.6

When requested, the court must give a cautionary instruction on accomplice testimony and should give it sua sponte in some situations. See *People v McCoy*, 392 Mich 231 (1974). It is proper to give the instruction no matter who calls the witness. *People v Heikkinen*, 250 Mich App 322 (2002).

It is appropriate to give a limited use instruction before the introduction of the co-defendant's statement. *People v Frazier (After Remand)*, 446 Mich 539 (1994). In *Frazier,* the Court addressed the use of a codefendant's statement in a joint trial. The court noted that statements by codefendant's are often suspect because the declarant is motivated to shift blame. A jury can draw strong inferences even from a partially redacted confession if it is connected with other evidence at trial. Where there is a substantial risk that the jury will consider a non-testifying codefendant's statement in assessing the guilt of the defendant, despite a cautionary instruction and despite partial redaction, such a statement is inadmissible because it violates the defendant's federal and state rights to confront the evidence through cross-examination.

However, despite the trial court's duty to give a cautionary instruction regarding accomplice testimony in some situations, a cautionary instruction should not be given regarding accomplice testimony when the testimony is from a co-defendant in a joint trial, and the co-defendant would be prejudiced by the instruction. *People v Reed,* 453 Mich 879 (1996). In *Reed*, the co-defendant, in a joint trial, took the stand in his own defense, thus the trial court could not give a cautionary instruction as it would have asked the jury to view his testimony suspiciously, thereby prejudicing his defense.

2.42 Negative Evidence

MRE 803(7) – Hearsay Exceptions; Availability of Declarant Immaterial; Absence of Entry in Records Kept in Accordance With Records of Regularly Conducted Activity

MRE 803(10) – Hearsay Exceptions; Availability of Declarant Immaterial; Absence of Public Record or Entry

A. Burden of Proof

> "Thus the burden upon him who relies upon negative testimony is marked: he must show the circumstances pertaining to the nonobservance, the witness' activities at the time, the focus of his attention, his acuity or sensitivity to the occurrence involved, his geographical location, the condition of his faculties, in short, all those physical and mental attributes bearing upon his alertness or attentiveness at the time. . . .
>
> "[T]he weight to be accorded the testimony of a witness, his credibility, whether or not his testimony is affirmative and convincing, rests with the jury." *Dalton v Grand Trunk W R Co,* 350 Mich 479, 486 (1957).

B. Absence of Record or Entry

MRE 803(7) states:

> "Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness."

MRE 803(10) states:

> "To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry."

C. Proof of Occurrence of Event

In *Williams v Grand Trunk W R Co*, 344 Mich 84, 88 (1955), the Court addressed the occurrence of the event in the context of a train accident, stating:

> "In order to have a jury question in such instances the cases generally require either positive testimony that the signals were

> not working or testimony that the signals were not seen or heard accompanied by evidence that a certain degree of attention and care was being exercised toward the possible area of danger. Mere testimony that the signals were not heard or seen does not, in and of itself, present an issue of fact as to whether or not they were operating."

Also see *Dalton v Grand Trunk Western R. Co*, 350 Mich 479 (1957). In *Buchthal v New York Central R Co*, 334 Mich 556, 564 (1952), the Court stated:

> "[t]he testimony that a witness did not hear signals cannot be considered unless it is shown affirmatively that the witness was in a position to hear signals if given and that she[or he] was paying attention when it is claimed the signals were being given."

D. Absence of Prior Accident Not Relevant on Issue of Negligence

"Testimony showing the absence of prior accidents is not competent evidence on the issue of defendants' alleged lack of negligence." *Mcauliff v Gabriel*, 34 Mich App 344, 349 (1971). [Citations omitted.] See also *Langworthy v Green Twp*, 88 Mich 207 (1891). For example, in *Larned v Vanderlinde*, 165 Mich 464 (1911), the defendant in a premises liability case offered testimony that the stairwell in the back room of a furniture store where plaintiff fell had been used for years without accident before she was injured. The Michigan Supreme Court unanimously held the "negative" evidence inadmissible, because "it would not be competent to prove an absence of accidents as tending to show an absence of negligence." *Id.* at 468.

E. Prior Conditions Are Relevant on the Issue of Notice of Defect

There was no error in receiving testimony showing the condition of this highway for several months before the accident. This testimony was admissible for the purpose of establishing constructive notice to the township officials. *LaDue v Lebanon Township*, 222 Mich 301, 304 (1923).

The Court of Appeals more recently reinforced this finding that "[t]he availability of . . . relevant, material testimony relating to conditions at the time of the accident should not be denied the fact finders under the rubric of 'negative evidence.'" *McAuliff, supra* at 349-350. Although such testimony is "admissible for the purpose of establishing constructive notice." *LaDue, supra* at 304.

Part V—Exhibits (MRE Articles IX and X)

2.43 Receipt, Custody, and Return of Exhibits

MCR 2.518 – Receipt and Return or Disposal of Exhibits

A. Marking Exhibits—MCR 2.518(A)

All exhibits should be marked prior to the scheduled court proceeding. Mark plaintiff exhibits with numbers; defendant exhibits with letters. Date each exhibit with the first date of the court proceeding, unless otherwise directed by the assigned judge.

B. Custody of Exhibits During Trial

Until exhibits are received by the court, they should be kept in the custody of the attorney/party. Once exhibits are received, they should be kept by the court unless the court directs otherwise.

Component 20 of the State Court Administrative Office Casefile Management Standards addresses the receipt and return of exhibits. The standard requires the maintenance of an exhibit log to monitor acceptance of exhibits offered into evidence. The standard also requires that the court have procedures for maintaining exhibits during a trial or hearing. "Narcotics, weapons, money and valuable or sensitive materials should be guarded or secured during court recesses and lunch hours."

C. Return of Exhibits—MCR 2.518(B)

Following trial, attorneys/parties should retrieve exhibits from the court and sign a receipt for the exhibits. Following hearing, the exhibits are ordinarily returned to the parties unless the court indicates otherwise. MCR 2.518(B) provides a mechanism for destroying exhibits.

D. Removal of Discovery Materials—MCR 2.316:

Pursuant to MCR 2.316, the clerk has the authority to remove and destroy discovery materials upon notification to the parties and counsel.

2.44 Chain of Custody

MRE 901 – Requirement of Authentication or Identification

A. Requirement of Authentication or Identification

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. MRE 901(a). The authentication rule only concerns material evidence that is actually admitted at trial. See *People v Berkey*, 437 Mich 40, 45, 47 (1991).

B. Foundation

An adequate foundation for the admission of proffered evidence must contain verification that the object was involved in the matter at hand and that the object is in substantially the same condition as when it was seized. *People v Prast (On Rehearing)*, 114 Mich App 469, 490 (1982); *People v Kemp*, 99 Mich App 485, 489 (1980); and *People v Beamon*, 50 Mich App 395, 398 (1973).

In evaluating the foundation presented for admission of an object into evidence, the trial court should consider the nature of the object, the circumstances surrounding the preservation and custody of the object and the possibility of an individual having the opportunity to tamper with the object while in custody. *People v Prast (On Rehearing)*, 114 Mich App 469, 490 (1982); *People v Kemp*, 99 Mich App 485, 489 (1980); and *People v Beamon*, 50 Mich App 395, 398 (1973).

C. Break in the Chain of Custody

A court is not required to automatically exclude proffered evidence because of a break in the chain of custody of the evidence. *People v Jennings*, 118 Mich App 318, 322 (1982); *People v Kemp*, 99 Mich App 485, 489 (1980). A court does not commit an abuse of discretion by admitting evidence when alleged deficiencies occurred in collecting and preserving the evidence and a vital link in the chain of custody of the evidence neither is missing, and there is no sign of tampering with the evidence appearing on the record. *People v Jennings*, 118 Mich App 318, 324 (1982). See *People v Stevens*, 88 Mich App 421, 424 (1979) and *People v Kozlow*, 38 Mich App 517, 527-528 (1972).

In *People v Ramsey*, 89 Mich App 260, 267 (1979), the Court of Appeals found that if a sufficient foundation is presented to satisfy the court that there is a reasonable probability that the object proffered into evidence is that which was originally seized, then a break in the chain of custody of the object will affect the weight given the evidence and not its admissibility. See *People v White*, 208 Mich App 126, 130-131 (1994).

D. Standard of Review

The trial court's decision on a challenge to the chain of custody is reviewed for an abuse of discretion. *People v Jennings,* 118 Mich App 318, 323 (1982).

2.45 Charts, Diagrams, and Summaries

MRE 401 – Definition of "Relevant Evidence"

MRE 901 – Self-Authentication

MRE 1006 – Summaries

A. Authentication and Identification—MRE 901

MRE 901 sets forth the requirement that evidence be authenticated or identified by showing that an item is what the proponent claims, before it may be admitted as evidence.

In *Hes v Haviland Products Co*, 6 Mich App 163, 171 (1967), the Court of Appeals found that the trial court did not abuse its discretion by allowing the introduction of a chart showing total sales when the original records were available but had not been admitted, because the court allowed counsel time to compare the original records with the chart to verify their accuracy.

B. Summaries—MRE 1006

For a summary to be admissible under MRE 1006 the proponent must show all of the following:

- The summary was voluminous recording, which cannot conveniently be examined in court;
- The underlying recordings must themselves be admissible in evidence;
- The originals or duplicates must be made available for examination or copying by other parties; and
- The summary must be an accurate summarization of the underlying materials. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 100 (1995).

C. Hearsay

In *Stachowiak v Subczynski*, 411 Mich 459, 464-465 (1981), the Michigan Supreme Court found that the trial court had not erred in admitting charts taken from medical textbooks over a hearsay objection, because the charts were offered to explain why a doctor had done something, not for the truth of the charts themselves, and the trial court had given a limiting instruction to the jury.

2.46 Demonstrative Evidence and Experiments

MRE 104 – Preliminary Questions

MRE 901 – Requirement of Authentication or Identification

MRE 1001 – Contents of Writings, Recordings, and Photographs

A. Purpose

Demonstrative evidence, including physical objects alleged to be similar to those involved in the incident at issue, is admissible where it may aid the fact finder in reaching a conclusion on a matter material to the case. *People v Howard*, 391 Mich 597, 602-603 (1974); *People v Gunter*, 76 Mich App 483, 493-494 (1977). "As with all evidence, to be admissible, the demonstrative evidence offered must satisfy traditional requirements for relevance and probative value in light of policy considerations for advancing the administration of justice." *People v Castillo*, 230 Mich App 442, 444 (1998).

B. Discretion

The court has discretion in admitting demonstrative evidence. *Finch v W R Roach Co*, 295 Mich 589 (1940). See *People v Castillo*, 230 Mich App 442, 444 (1998). Exhibits which illustrate testimony, yet are not necessary to aid in understanding the testimony, are properly excluded. *McGrail v Kalamazoo*, 94 Mich 52, 56 (1892). Further, exhibits which are self serving are not admissible. *Insealator, Inc v Wallace*, 357 Mich 233 (1959).

C. Illustrative Evidence Versus Re-Creation Evidence

The Court of Appeals reaffirmed the evidentiary rule of *Smith v Grange Mutual Fire Ins Co*, 234 Mich 119, 126 (1926), that demonstrative evidence is admissible if it bears "substantial similarity" to an issue of fact involved in a trial. *Lopez v General Motors Corp*, 224 Mich App 618, 630 (1997). The burden is on the party presenting the evidence to satisfy the court that similar conditions exist. *Duke v American Olean Tile Co*, 155 Mich App 555, 561 (1986). The lack of exact identity of test and accident conditions goes to the weight and not the competency of the evidence. *Jenkins v Frison Building Maintenance Co,* 166 Mich App 716, 721 (1988).

In *Lopez v General Motors Corp*, 224 Mich App 618, 630 (1997), the court observed that the standard for demonstrative evidence which is used to illustrate an expert's testimony differs from re-creation evidence which is used to illustrate the event at issue in a particular case. The court noted:

> "The *Kaminski* [*v Wayne County Road Commissioners*, 370 Mich 389 (1963)] 'faithful reproduction' standard has, in recent years, been described as requiring 'virtual identity' between the

> proffered evidence and the event that evidence purports to re-create. See *Green v. General Motors Corp.*, 104 Mich. App. 447, 449-450; 304 N.W.2d 600 (1981). As described in *Green*, the distinction between demonstrative evidence and re-creation evidence, and the standards of admission associated with each is important. *Id.* at 450. When evidence is offered to show how an event occurred, the focus is upon the conditions surrounding that event. *Id.* Consequently, it is appropriate that those conditions be faithfully replicated. *Id.* By contrast, when the evidence is being offered not to re-create a specific event, but as an aid to illustrate an expert's testimony concerning issues associated with the event, then there need not be as exacting a replication of the circumstances of the event. *Id.*" *Lopez, supra* at 628, fn 13 (1997).

In *Smith v Grange Mutual Fire Ins Co*, 234 Mich 119, 126 (1926), (quoting 22 C.J. p 759), the Court addressed the admissibility of illustrative experiments and found that "[i]t is not necessary for the conditions should be exactly identical, but a reasonable or substantial similarity, is sufficient, and the lack of exact identity affects only the weight and not the competency of the evidence, provided always that there is such a degree of similarity that evidence of the experiments will . . . assist[] the jury to an intelligent consideration of the issues of fact presented."

D. Standard of Review

The admissibility of experiments performed by experts and non-experts is a matter within the discretion of the trial court. *Duke v American Olean Tile Co*, 155 Mich App 555, 560 (1986).

2.47 Photographs, Videotapes, Audiotapes

A. Photographs

> "A proper foundation for the admission of photographs is made if someone who is familiar from personal observation of the scene or person photographed testifies that the photograph is an accurate representation of the scene or person. *People v Lobaito*, 133 Mich App 547, 560; 351 NW2d 233 (1984). Photographs are admissible despite changes in the condition of the scene or person where a person testifies as to the extent of the changes. *Id.*; *People v Herrell*, 1 Mich App 666, 668; 137 NW2d 755 (1965)." *In re Robinson*, 180 Mich App 454, 460-461 (1989).

In *People v Mills*, 450 Mich 61, 76 (1995), the Court stated:

> "The decision to admit or exclude photographs is within the sole discretion of the trial court. Photographs are not excludable simply

because a witness can orally testify about the information contained in the photographs. Photographs may also be used to corroborate a witness' testimony. Gruesomeness alone need not cause exclusion. The proper inquiry is always whether the probative value of the photographs is substantially out-weighed by unfair prejudice.

"In *People v Eddington,* 387 Mich 551, 562-563 (1972), the Supreme Court stated:

> 'Photographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions. . . . However, if photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors.'"[Citations omitted.]

B. Videotapes

The admission of videotapes is closely analogous to the admission of photographic evidence, and the same standard should be applied as to photographic evidence, although in exercising its discretion, the trial court must take into account the differences between the two media. *People v Sharbnow*, 174 Mich App 94, 102 (1989); and *People v Barker*, 179 Mich App 702, 710 (1989). See also *Rogers v Detroit*, 457 Mich 125, 151-152 (1998) and *People v Hack*, 219 Mich App 299, 309-310 (1996).

C. Audiotapes

Transcript of audiotape. The Sixth Circuit Court of Appeals, *United States v Robinson*, 707 F2d 872 (CA 6, 1993), has set out the preferred procedures for ensuring the accuracy and fairness of audiotape transcripts. In *People v Lester,* 172 Mich App 769, 775 (1988), the Court of Appeals reiterated the *Robinson* procedure:

> "The first method was by stipulation by the parties. The second method was for the trial court to make an independent determination before trial by checking the transcripts against the tape. The least preferred method was to present the jury with two transcripts, one containing the state's version and the other defendant's. The panel observed that, while this list was not exhaustive, each procedure entails basic safeguards to ensure reliability. *Robinson, supra* 876-877."

The *Lester* court went on to state:

> "The trial court should have taken steps to insure the accuracy of the transcript before it was shown to the jury. In order to guide courts in the future, this Court adopts prospectively the procedure set forth in *Robinson, supra* at pp 878-879:
>
> > 'We therefore reiterate our preference for using a transcript when the parties stipulate to its accuracy. But in the absence of a stipulation, we hold that the transcriber should verify that he or she has listened to the tape and accurately transcribed its content. The court should also make an independent determination of accuracy by reading the transcript against the tape. Where, as here, there are inaudible portions of the tape, the court should direct the deletion of the unreliable portion of the transcript. This, however, assumes that the court has predetermined that unintelligible portions of the tape do not render the whole recording untrustworthy. Finally, we find submission of two versions of the transcript prejudicial when the tape is significantly inaudible. Such a practice would undoubtedly inspire wholesale speculation by the parties and engender jury confusion. It would be entirely too difficult for the jury to read two separate transcripts while listening to the tape recording. Furthermore, this method is impractical in cases . . . where the defendant has asserted his Fifth Amendment right to remain silent.'" *Lester, supra,* at 776.

D. Digitally Enhanced Evidence

Two courts have permitted the use of digitally enhanced fingerprints. *State v Hayden*, 950 P2d 1024, 1028 (Wash Ct App 1998) and *State v Hartman*, 754 NE 2d 1150, 1165-1166 (Ohio Supreme Court 2001).

2.48 Writings and Documents

MRE 1001 – Contents of Writings, Recordings, and Photographs

MRE 1002 – Requirement of Original

MRE 1003 – Admissibility of Duplicates

MRE 1004 – Admissibility of Other Evidence of Contents

MRE 1005 – Public Records

MRE 1006 – Summaries

MRE 1007 – Testimony or Written Admission of a Party

MRE 1008 – Functions of Court and Jury

A. Best Evidence Rule—MRE 1002*

*See Section 2.45 for a discussion of the admission of summaries pursuant to MRE 1006.

> "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." MRE 1002.

MRE 1003 provides for the admissibility of duplicates, unless (1) there are genuine questions of authenticity of the original or, (2) it would be unfair. See MRE 1004 and MRE 1005 for other exceptions to the best evidence rule.

In *People v Andre Alexander*, 112 Mich App 74, 76 (1981), the Court held:

> "The best evidence rule only applies when the contents of a writing are in issue. In the case at bar, the contents are not in issue, or are not an operative fact, and the rule should not have been invoked."